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HUGONIS GROTHI  
*DE JURE BELLI ET PACIS*  
LIBRI TRES

ACCOMPANIED BY AN ABRIDGED TRANSLATION

BY

WILLIAM WHEWELL, D.D.

MASTER OF TRINITY COLLEGE,

AND PROFESSOR OF MORAL PHILOSOPHY IN THE UNIVERSITY OF CAMBRIDGE

WITH THE NOTES OF THE AUTHOR, BARBEYRAC, AND OTHERS.

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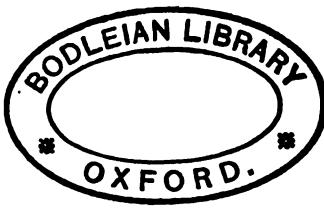


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## VOLUMINE SECUNDO CONTINENTUR

### *LIBRI SECUNDI*

#### CAPITA IX—XXVI.

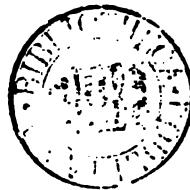
	PAGE
IX. Quando imperia vel dominia desinant . . . . .	1
X. De obligatione quæ ex dominio oritur . . . . .	18
XI. De Promissis . . . . .	30
XII. De Contractibus . . . . .	54
XIII. De Jurejurando . . . . .	83
XIV. De eorum qui summum imperium habent promissis et contractibus et juramentis . . . . .	112
XV. De Federibus ac Sponzionibus . . . . .	128
XVI. De Interpretatione . . . . .	155
XVII. De damno per Injuriam dato, et Obligatione quæ inde Oritur . . . . .	188
XVIII. De Legationum Jure . . . . .	200
XIX. De Jure Sepulturæ . . . . .	220
XX. De Poenis . . . . .	238
XXI. De Poenarum Communicatione . . . . .	339
XXII. De Causis Injustis . . . . .	378
XXIII. De Causis Dubiis . . . . .	396
XXIV. Monita de non temere etiam ex justis causis sus- cipiendo Bello . . . . .	412
XXV. De Causis belli pro aliis suscipiendi . . . . .	430
XXVI. De Causis justis ut bellum geratur ab his qui sub alieno imperio sunt . . . . .	448



HUGONIS GROTI  
DE JURE BELLI AC PACIS.  
LIBER SECUNDUS.

CAPUT IX.

QUANDO IMPERIA VEL DOMINIA DESINANT.



- |   |   |
|---|---|
| I. <i>Dominium et imperium tolli sublato eo qui jus habuit, nec existente successore:</i> | VII. <i>Non etiam migratione:</i>   |
| II. <i>Sic et jus familiæ extincta familia:</i>   | VIII. <i>Aut mutato regimine: ubi de loco qui debeatur novo regi aut populo liberato.</i> |
| III. <i>Sic et populi, si populus esse destinat:</i>                                      | IX. <i>Quid si populi uniantur?</i>   |
| IV. <i>Quod fit, sublatis partibus necessariis:</i>                                       | X. <i>Quid si dividatur populus?</i>  |
| V. <i>Sublato corpore toto populi:</i>  | XI. <i>Cujus nunc sint quæ Romani imperii fuerunt, nec alienata apparent.</i>             |
| VI. <i>Sublata forma, qua est populus:</i>  | XII. <i>De jure heredum.</i>  |
|   | XIII. <i>De jure victoris.</i>  |

I. **Q**UOMODO primitus acquirantur, et quomodo transeant tum dominia privata, tum imperia, satis diximus: quomodo desinant, videamus. Et quidem derelictione desinere obiter supra demonstratum est, quia voluntate cessante non manet dominium. Est et alias desinendi modus, sublato subjecto<sup>1</sup> in quo est imperium vel dominium, ante alienationem scilicet vel expressam vel tacitam, qualis est in successionibus ab intestato. Quare si qua persona, nulla edita

<sup>1</sup> Confer PUFENDORF. *De Jure Nat.* cap. 3. § 11. et Lib. viii. cap. 11. § 1. et *Gent.* Lib. iv. cap. 6. § 14. Lib. vi. J. B.

CHAPTER IX. *When Lordship and Ownership cease to exist.*

I. We have sufficiently explained how both private ownership and public authority is acquired, and how it is transferred; let us now consider how it ceases.

That it ceases by derelict, is above shewn in passing; because the will ceasing, the ownership does not remain. There is also another mode of its ending: the subject or person in whom the lordship or ownership resides being removed, that is, before alienation either express at least, or tacit, such as there is in successions to intestates.

voluntatis significatione, nullo consanguineo relicto, moriatur, omne jus quod habet interit, ac proinde servi (nisi lex humana impedit) erunt liberi: populi qui in ditione ejus fuerant sui juris fient; quia non sunt hæc sui natura occupabilia: nisi libertatem suam ultro deserant: res autem aliæ fient occupantis.

II. Idem dicendum <sup>a</sup> si familia defecerit, quæ jus aliquod habebat.

*De Pact. p.  
163 d.*

*L. Rer. 30.  
D. de Unr. et Uruc.*

III. 1 Idem, si *populus*. Dixit Isocrates, et post eum

<sup>b</sup> Julianus imperator, civitates esse immortales, id est, esse posse, quia scilicet *populus* est ex eo corporum genere, quod

<sup>a</sup> *Si familia defecerit]* Ut Danica olim Crantz. *Vand.* viii. 22. Rugia. Crantzius idem *Vand.* viii. 12. Pelasgorum et Thessalorum. Gregorius Lib. vii. (in fin. pag. 127. *Ed. Colon.* 1616). Usumcaasanidarum in Perside Leunclavius xvi. Adde Leonem Lib. 11. Africano rum (pag. 136. *Ed. Elzevir.*) de Tar rodano: et si vis, Ernestum Cothmanum cons. xli. num. 1. et sequentibus.

<sup>b</sup> Locus est in *Epistola pro Argivis*: *Tὰς πόλεις δὲ ἀθανάτους οὐσιας etc.* Pag. 411 v. *Ed. Spanh.* J. B.

*Ex distantibus]* Seneca epistola cii. quædam continua esse corpora, ut hominem: quædam composita, ut navem, domum, omnia denique quorum partes diversæ junctura in unum sunt coactæ: quædam ex distantibus, quorum adhuc membra separata sunt, tanquam exercitus, *populus*, *senatus*. Sumta hec ex Achille Tatio, cuius ad Aratum hec sunt verba, (cap. xiv. *Ed. Petav.*) ex Conone illo, cuius repertum

est coma Berenices: πάρεγήροε δὲ Κόνων ὡς μαθηματικός, σώματα λέγεσθαι δύο ὑπὸ μιᾶς ἔξεως ἡνωμένα κρατεῖται, οἷον λίθος, ξύλον. ἔστι δὲ ἔξι πνεύμα σώματος συνεκτικόν. συνημμένου δὲ ὅσα οὐχ ὑπὸ μιᾶς ἔξεως δέδεται, ὡς πλοῖον καὶ οἰκίᾳ. τὸ μὲν γάρ ἐκ πολλῶν τανίδων, η δὲ ἐκ πολλῶν λίθων σύγκειται, διεστῶτα δὲ, ὡς χορός. τῶν δὲ τοιούτων διτταὶ αἱ διαφοραὶ. τὰ μὲν γάρ ἐξ ὀρισμένων σωμάτων καὶ ἀριθμῷ ληπτῶν, ὡς χορός. τὰ δὲ ἐξ ἀριστῶν, ὡς ὄχλος. *Observavit mathematicus Conon, corpora dici quæ uno tenore unum fiunt. Est autem tenor spiritus corpus continens. Connexa vero, quæ non uno tenore juncta sunt, ut navis, ut domus: nam et illa ex multis est tabulis, et hæc ex lapidibus multis: distantia ut chorus: sed et hæc datum generum inter se differentium. Sunt enim alia ex corporibus definitis et quæ numerum habent cogniti faciliem, ut chorus: alia ex infinitis, ut populus.* Apparet hinc sumpta

Wherefore if any person die without giving any indication of his will, and without leaving any relative, every right which he had perishes, and therefore his slaves (except some human law prevent it) will be free; the peoples who had been under his authority will be their own masters, because these things (slaves and governments) are not things which can be taken possession of by the first comer; but his other property may be so occupied.

II. The same which we have said of a person may be said of a Family which fails, and which had any rights.

III. 1 The same, if a People fails. Isocrates, and after him the Emperor Julian said, that states are immortal; that is, that they may be so; because a People is that kind of body which consists of separate

<sup>b</sup> ex distantibus constat, unique nomini subjectum est, quod habet ἔξιν μίαν, ut Plutarchus; spiritum unum, ut Paulus Jurisconsultus loquitur. <sup>c</sup> Is autem spiritus, sive ἔξις, in populo est vitæ civilis consociatio plena atque perfecta, cuius prima productio est summum imperium, vinculum per quod respublica cohæret, spiritus vitalis quem tot millia trahunt, ut Seneca loquitur. Plane autem corpora hæc artificialia instar habent corporis naturalis. Corpus naturale idem esse non desinit, <sup>d</sup> particulis paulatim commutatis, una manente specie, ut Alphenus ex philosophis disserit.

2 Atque ideo commode interpretandum, quod ait Seneca,

qua habet Pomponius L. rerum. 30. de usurp. et usucap. et quod Paulus dicit statuam uno spiritu contineri l. in rem. *De Rei Vind.* 23. § item. 5. ubi similiter distinguit inter corpora cohærentia et qua sunt ex distantibus. Usi et alii. Philo de Mundo (pag. 1164 e): ἔξις ἐπτρι τυνέμια ἀναστρέφοι ἄφ' ἑαυτῷ· tenor est spiritus in semet se revolvens, etc. item: ἔξις ἐπτρι τυνεματικὸς τόνος, δεσμὸς οὐκ ἀρόγκτος· δλλὰ μόνον δυσδιάλυτος. Tenor est spiritualis continentia, vinculum non insolubile, sed solute difficile. (Pag. 1169 A.) Vide et Boethium I. arithmeticorum: (cap. I.) et nota cum de populo ἔξιν aut spiritum dicimus, non sumere nos vocem in suo rigore, ut Conon fecit, sed ἀναλογικῶς, comparatione quadam, quali utimur etiam cum populum corpus appellamus. Spiritum hunc rei speciem vocat Alphenus in l. proponebatur. 76. D. de judiciis.

<sup>c</sup> Is autem spiritus, sive ἔξις, in po-

pulo] Η πολιτεία, βίος πόλεως. Aristoteles Polit. iv. 11.

<sup>d</sup> *Particulis paulatim commutatis]* Exemplum in navi dat Alfenus dicto jam loco, et Ulpianus in l. quid tamen 10. D. quibus modis ususfructus amittatur. Narem eandem esse aiunt, si per partes refecta sit. Aliud si dissoluta et recomposita. l. qui res. 98. § aream. 8. D. de solutionibus, Plutarchus Theseo: τὸ δὲ πλοῖον ἐν ὃ μετὰ τῶν ηθέων ἐπλευσε καὶ πάλιν ἐσώθη, τὴν τριηκόντορον, ἕχρι τῶν Δημητρίου τοῦ Φαληρέως χρόνων διεφύλαττον οἱ Ἀθηναῖοι, τὰ μὲν παλαιὰ τῶν ξύλων ὑφαιροῦντες, ἀλλὰ δὲ ἐμβάλλοντες λοχυρά, καὶ συμπτηγύνοντες, οὕτως ὥστε καὶ τοῖς φιλοσόφοις εἰς τὸ αἰξόμενον [legendum αὐξομένων, ut habeat MS.] λόγον ἀμφιδοξούμενον παράδειγμα τὸ πλοῖον εἶναι, τῶν μὲν ὡς τὸ αὐτό, τῶν δὲ ὡς οὐ τὸ αὐτό διαμένει, λεγοντων· Narem autem, in qua cum delecta juventute navigavit saltusque rediit Theseus,

elements, but is subject to one name, and has one habit, as Plutarch says, one spirit, as Paulus. This spirit or habit in a people is the full and perfect common participation of civil life; the first production of which is the sovereignty, the bond by which the State is held together, the vital breath drawn by so many thousands, as Seneca speaks. And these artificial bodies have plainly an analogy with natural bodies. A natural body does not cease to be the same, though the particles are gradually changed, the Form remaining the same, as Alphenus, after the philosophers, discourses.

2 And thus we can explain what Seneca says, that no one of us is the same in age which he was in youth, this being understood of the

*De Anim.*  
*Proc. p. 1025*  
*C. 23. § 5. D.*  
*De Rei Vind.*

*Sen. Lib. I.*  
*De Clem. c. 4.*

*L. 76. De  
Judic.  
Epist. 58.*

p. 412 A.

POL. III. 3.

p. 559 A.

neminem nostrum eundem esse in senectute, qui fuit juvenis, ut de materia sola intelligatur; <sup>e</sup> quomodo Heraclitus dixerat, citante Platone in *Cratyllo*, et Seneca dicto loco, in idem flumen bis nos non descendere: quod recte sic corrigit Seneca: *Manet idem fluminis nomen, aqua transmissa est.* Sicut et Aristoteles flumen populo comparans dixit, flumina eadem vocari quanquam alia subeat semper aqua, alia decedat. Neque vero manet nomen inane: sed et ἔξι illa, quam Conon definit ἔξι σώματος συνεκτικήν, Philo πνευματικὸν συνέχον, Latine quoque spiritum vocant. Sic erga populus, Auctore Alpheno et Plutarcho de sera numinis vindicta, idem hoc tempore putatur qui abhinc centum annis fuit, cum ex illis nemo nunc vivit: μέχρις ἀν ή ποιῶσα καὶ συνδέουσα ταῖς ἐπιπλοκαῖς κοινωνία τὴν ἐνότητα διαφυλάττῃ: *quamdiu illa, quæ populum facit et mutuis nexibus vincit, communio jus unitatis suæ servat;* quæ ejusdem Plutarchi in hac re verba sunt. Et hinc ortus mos loquendi,

*triginta apiam remis conservarunt Athenienses ad usque tempora Demetrii Phalerensis, subtrahendo ligna vetustate cariosa, subjiciendo alia, ita ut cohererent, unde et exemplum hæc navis facta est philosophis disputantibus de ea quaestione, quæ de augescentibus dicitur, in qua hanc navem ad ultima tempora eandem fuisse affirmant hi, illi negant.* (Pag. 10 c.) In has controversias philosophis decertata prudenter Jurisconsulti aientem partem prætulere. Et

Tertullianus juris valde peritus libro *de Resurrectione Carnis* (cap. 80): *Narem procella dissipatam vel carie dissolutam, redactis et recurvatis omnibus membris, eandem sæpe consperimus, etiam titulo restitutionis gloriantem.* Intellige manente carina, quomodo vox resoluta [Immo dissolvit] etiam sumenda in Pauli verbis l. inter stipulanten. 73. § sacram. 5. D. de verb. oblig. Idque et apud Tertullianum præcedentia, et apud Paulum sequentia evincunt. Philo de

matter of which we consist; as Heraclitus said, according to the quotation of Plato in the *Cratylus*, and Seneca in the above cited place, that we cannot bathe twice in the same river: which Seneca rightly corrects, by saying the name of the river remains, the water passes. So Aristotle, comparing a river to a people, says, that rivers are called the same, though new water is constantly coming in, old water going out. Nor is it the empty name which remains; but that habit, which Conon defines as a *habit holding the body together*; and Philo, as a *spiritual bond*, and which the Latins also call *the spirit of the thing*. Thus a People, as Alphenus and Plutarch say, is reckoned the same now as it was a hundred years ago, though none of those who lived then is alive now. *As long as that communion which makes a people and binds it together with mutual bonds preserves its unity*, as Plutarch expresses it. And hence arises the mode of speaking, that when we address a people now existing, we attribute to it what happened to the same People several

ut populum qui nunc est alloquentis, ei tribuamus quæ eidem populo ante multa sæcula acciderunt, ut videre est tum apud historicos, tum et <sup>in</sup> libris sacris, ut Marci x. 3. Joh. vi. 32. vii. 19, 22. Actor. vii. 38. Sic apud Tacitum Antonius Primus <sup>Hist. ill. 24.</sup> Vespasiano militans milites Tertianos veterum admonet, *ut sub M. Antonio Parthos, sub Corbulone Armenios repulissent.*

3 Ex odio itaque, non ex vero apud eundem Tacitum Piso <sup>et</sup> negat Athenienses sui temporis esse Athenienses, quippe tot cladibus extinctos, sed illuviem nationum. Nam externa illa accessio de dignitate forte aliquid detraxerat, populum alium non fecerat. Nec id is ipse ignoravit, cum illis ipsis sui temporis Atheniensibus objectaret vetera, quæ in Macedonas improspere, violenter in suos fecissent. At sicut particularum mutatio non efficit ut populus esse desinat qui fuit, nec per annos quidem mille et amplius, ita fieri posse ut intereat populus negari non potest. Fit autem hoc dupli-

*Mundo : οὐ γάρ διπούθεν οὐ πάντα τὰ μέρη φθείρεται, φθαρτὸν λέγειν ἐκεῖνο, ἀλλ' οὐ πάντα τὰ μέρη ἄμα καὶ ἐν ταυτῷ ἄθροις κατὰ τὸν αὐτὸν χρόνον. Non cuius partes pereunt utique interitui obnoxium est, sed cuius omnes partes simul et eodem tempore pereunt.* (Pag. 1171 ε.)

*ε Quomodo Heraclitus] Et Epichar-*  
mus apud Diogenem Laertium. (Lib.  
III. § 11).

<sup>1</sup> *In libris sacris]* Adde Matth. xxiii.  
35; Act. iii. 22.

<sup>ε Negat Athenienses sui temporis esse</sup>  
*Athenienses]* Contra de iisdem Atheni-  
ensibus Julianus Misopogone. [Nil de  
Atheniensibus in Libro illo, qui adver-  
sus Antiochenses scriptus est. In ani-  
mo forte habuit Auctor, quo Julianus  
dicit in *Epist. ad Athenienses*, ab initio,  
pag. 268, 269. Ed. Spanhem. J. B.]

generations ago; as we may see both in the historians, and in the Scriptures. [See the passages.] So in Tacitus, Antonius Primus reminds the veterans of the Third Legion, that, *Under M. Antonius, they had repelled the Parthians, under Corbulo, the Armenians.*

3 It is therefore through spite, and not as speaking truly, that in the same Tacitus, Piso denies that the Athenians of his time are the Athenians, those being extinct by a succession of calamities; and says, that they are a mixture of the dregs of nations. For that accession of strangers had perhaps detracted something from the dignity of the people, but had not made it another people. Nor was he ignorant of this, since on those very Athenians of his time he charged the old faults which they had committed, their failures against the Macedonians, their violence against their own citizens.

But while the change of component parts does not make a people cease to be what it was, even for above a thousand years; it cannot be denied that a people may cease to be: and this may happen in

Theod.  
Hist. Eccl.  
v. c. 20.  
Zon. in Val.  
et Theod.  
Flor. ii. 15.

Plut. Ages.  
p. 616 a.

qui alterius populi ditionem subierunt. Sic <sup>a</sup> a Severo Byzantium Perintho, <sup>b</sup> Antiochia Laodiceæ supposita a Theodosio.

VII. At vero si loco migraverit populus, sive sponte ob inediam, aut alia mala; sive coactus, ut populus Carthaginensis bello Punico tertio, si species quæ dixi maneat, <sup>c</sup> populus esse non desinit, multoque minus si muri tantum urbis disiecti sunt. Itaque cum ad pacem Græciæ jurandam Lacedæmonii negarent admittendos Messenios, quod ejus urbis muri essent diruti, contra eos a communi sociorum concilio res judicata est.

VIII. 1 Neque refert quomodo gubernetur, regione, an plurium, an multitudinis imperio. Idem enim est populus Romanus sub regibus, consulibus, Imperatoribus. Imo etiamsi plenissimo jure regnetur, populus idem erit qui antea erat cum sui esset juris, dum rex ei præsit, ut caput istius populi, non ut caput alterius populi. Nam imperium quod in rege est ut in capite, in populo manet ut in toto, cuius pars est caput: atque adeo rege, si electus est, aut regis familia extincta, jus imperandi ad populum reddit, ut supra ostendimus. Neque

<sup>a</sup> A Severo] Vide Xiphilinum Se-      quæ infra hoc libro ii. cap. xxi. § 7.  
vero: Herodianum, libro iii. (c. 6) adde      <sup>b</sup> Antiochia Laodiceæ supposta]

VII. If the People migrate from its place, either of its own will, on account of famine, or other calamity; or under compulsion, as the Carthaginian people in the third Punic war, if the form of which I have spoken remain, the people does not cease to be; still less, if the walls of the city only are thrown down. Therefore when the Lacedæmonians would have excluded the Messenians from being admitted among those who were to swear to the peace of Greece, because their city-walls were destroyed, the matter was decided against them by the common council of the allies.

VIII. 1 Nor does it make any difference how the people is governed, whether by the authority of a king, or that of a number, or that of the multitude. The Roman people was the same under kings, consuls, emperors. Even if the king govern with the most absolute power, the people will be the same which it was before, when it was its own master; provided the king is set over it as the head of that people, not as the head of another people. For the authority which is in the king as the head, is in the people as the whole body, of which the head is a part: and therefore when the king, if he be elective, or the king's family, is extinct, the supreme authority reverts to the people, as we have shewn above.

Nor is the objection from Aristotle valid; when he says that the

est quod Aristotelem hic mihi quis objiciat, qui reipublicæ forma mutata negat eandem esse civitatem, sicut, inquit, harmonia non eadem est ubi a Dorico modo in Phrygium transitur.

2 Sciendum enim est unius rei artificialis plures esse posse species, sicut legionis species una est qua regitur, altera qua militat. Ita civitatis species una est, consociatio juris atque imperii; altera, relatio partium inter se earum quæ regunt, et quæ reguntur. Hanc spectat politicus, illam jurisconsultus: quod nec Aristotelem latuit cum ita subjicit: *an vero exsol- venda sint nomina necne, mutata gubernandi forma, alia inspectio est*: artis scilicet alterius, quam cum politica non confundit Aristoteles, ne quod in aliis culpat admittat ipse, μεταβαίνων ἐκ γένους εἰς γένος, ab uno tractandi genere ad alterum transitum faciens.

3 Non desinit debere pecuniam populus, rege sibi imposito, quam liber debebat: est enim idem populus, et dominium retinet eorum quæ populi fuerant, imo et imperium in se retinet, quanquam jam non exercendum a corpore, sed a capite:

Vide Zonaram. (Lib. xiii. cap. 18.) in fragmentis Peirescianis. [Immo in  
Populus esse non desinit] Ut Geloi prioribus, Excerpt. e Lib. xxii.]  
Phintiada translati. Diodorus Siculus

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form of the State being changed, the State is no longer the same; as, says he, the harmony is not the same when we modulate out of the Dorian mood into the Phrygian [though the notes may be the same].

2 For it is to be understood that an artificial thing may have several forms; thus, one form of a legion (or regiment) is its government by *legati, tribuni, centuriones*; (colonels, captains, serjeants, &c.): another form of the same body is its order of march or of battle. Thus one form of a State is the common participation of right and authority; and another is the relation of the parts governing and governed. The politician looks at the latter form, the jurist at the former: and Aristotle was aware of this, when he subjoins, *Whether the name (of the State) is to be changed when the form of government is changed, is another inquiry*: that is, it belongs to another science [*Jus*], which Aristotle does not confound with Political Science (*Politica*), that he may not commit the fault which he blames in others, of *passing to another genus*.

3 When a People has a king placed over it, it does not cease to owe the moneys which it owed being free: for it is the same people, and retains the ownership of the things which had belonged to the people; and also authority over itself, though this authority is not

unde parata est responsio ad controversiam ex facto nonnunquam agitatam, quo loco in conventibus sedere debeat qui summum imperium in populum ante liberum accepit: eodem nimirum quo ipse populus: sicut in Amphictyonico concessu Phocensium <sup>3</sup> locum accepit Philippus Makedo: sic vicissim qui regis fuerat locus, eum populus liber implebit.

Liv. I. 13. IX. Quod si quando <sup>4</sup> uniantur duo populi, non amittentur jura, sed communicabuntur, sicut Sabinorum primo, deinde Albanorum jus in Romanos transfusum est, et una facta res publica, ut Livius loquitur. Idemque censendum de regnis, quæ non fœdere, aut eo duntaxat quod regem communem habent, sed vera unitate junguntur.

X. Contra evenit, ut quæ una civitas fuerat dividatur, aut consensu mutuo, aut vi bellica, sicut corpus imperii Persici divisum est in Alexandri successores. Quod cum fit, plura pro uno existunt summa imperia, cum suo jure in partes singulas. Si quid autem commune fuerit, id aut communiter est administrandum, aut pro ratis portionibus dividendum. Huc refe-

<sup>3</sup> In Decreto Amphictyonum, quale refert DIOD. SICULUS, Lib. xvi. cap. 61. nihil legitur de loco, quo Philippus sessurus esset; sed tantum illum duo habiturum suffragia, quemadmodum Phocenses habebant. *J. B.*

<sup>4</sup> *Uniantur duo populi]* Ut ex Celtis

et Iberis facti Celtiberi, narrante Diodoro, (Lib. v. c. 33.) Vide, si vacat, de hoc argomento Reinkingium libro i. classe iv. c. 17. n. 95. et quæ ibi citata.

<sup>5</sup> *Ut pari jure sint]* Salva tamen reverentia matribus debita, de qua egimus Lib. i. c. iii. § 21. Curtius, libro

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now to be exercised by the body, but by the head. And hence we see what answer is to be made to a controversy which sometimes arises from circumstances; In what place in a convention ought he to sit who has acquired the sovereignty over a people free before: as in the Amphictyonic council, Philip of Macedon had the place which the Phoeceans had had. And so on the other hand, the place which had belonged to the king, shall be filled by the people, made free.

IX. If at any time two Peoples are united, their rights will not be lost, but imparted by each to the other; as the rights, first of the Sabines, and afterwards of the Albans, were imparted to the Romans, and they were made one republic, as Livy speaks. The same is to be conceived of kingdoms which are united, not by league, nor only because they have a common king, but joined by a real union.

X. It may happen, on the contrary, that what had been one State is divided, either by mutual consent, or by war; as the body of the Persian empire was divided among the successors of Alexander. When this happens, there are several sovereignties in the place of one, each having its rights over the separate parts. If there was anything

renda et discessio, quæ ex consensu fit in colonias. Nam sic quoque novus populus sui juris nascitur: οὐ γὰρ ἐπὶ τῷ δοῦλοι, ἀλλ' ἐπὶ τῷ ὄμοιοι εἶναι ἐκπέμπονται, inquit Thucydi- Lib. I. 34.  
des: *Non enim ut servi, sed ut pari jure sint dimittuntur.*  
Idem secundam coloniam a Corinthiis Epidamnum deductam Cap. 27.  
narrat ἐπὶ τῇ ἵση καὶ ὄμοιᾳ, *ut pari jure esset.* Rex Tullus  
apud Dionysium Halicarnassensem: τὸ δὲ ἄρχειν ἐκ παυτὸς Lib. III. II.  
τῶν ἀποικιῶν τὰς μητροπόλεις ὡς ἀναγκαῖον τι φύσεως  
νόμιμον, τοῦτο ἀληθές οὔτε δίκαιον ηξιοῦτο ὑφ' ἡμῶν. *Ut*  
*omnino matrices urbes coloniis imperent, quasi naturæ lege,*  
*id vero nos neque verum neque aequum arbitramur.*

XI. 1 Nobilis est et illa quæstio apud historicos et jurisconsultos, de his quæ Romani imperii fuerunt cujus nunc sint: multi ea nunc esse volunt Germanici sive regni, ut olim vocabatur, sive imperii (utro autem nomine appelles ad rem non refert) et nescio quam surrogationem hujus imperii in illius locum sibi configunt, cum tamen *'notum satis sit Germaniam magnam, id est Transrhenanam, totam maxima temporis*

iv. *Carthaginem Tyrii condiderunt, semper parentum loco culti.* (Cap. 2.)

<sup>4</sup> Hoc minime probat, *Imperatores Germania* non successisse in locum *Imp. Romanorum:* quid enim obstat, quominus illi alio titulo simul sub di-

complexum Imperii Romani fuerant? Vera ratio est, quam tamen Auctor non adgnoscit, jus Populi Romani dudum extinctum, eo tempore quo Carolo Magno se subjecit. Sed de tota hac quæstione, quod satis est, diximus in Notis nostris Gallicis. Auctor heic passim ab

which they had in common, that is either to be administered in common, or to be divided proportionally.

To this head also is to be referred the separation of a Colony from the mother-country. For in this case also there is produced a new people which is its own master: *They are sent out not to be slaves, but to have equal rights*, says Thucydides. And so he says that the second Colony was sent by the Corinthians to Epidamus to have fair and equal rights. Tullus in Dionysius of Halicarnassus says, *That the mother-country should govern her colonies, as a necessary law of nature, we do not think either true or just.*

XI. 1 There is a very celebrated question among historians and jurists, To whom now belong the Rights which did belong to the Roman Empire?

Many hold that these rights belong to the German Kingdom, as it was formerly called, or the German Empire; (it makes no difference which name you adopt:) and they conceive that, in some way or other, one Empire was put in the place of the other. And yet it is well known that Great Germany, that is, Germany beyond the Rhine,

parte fuisse extra complexum Romani imperii. Mihi non præsumenda videtur mutatio aut translatio, nisi certis documentis probetur. Quare et populum Romanum eundem esse dico, qui olim fuit, quanquam extraneorum accessione admixtum, et imperium penes eum mansisse, tanquam penes corpus, in quo esset ac viveret. Nam quæ olim jure potuit facere populus Romanus, antequam Imperatores Romani regnarent, idem faciendi jus habuit, ut quisque Imperator mortuus erat, alio nondum existente. Imo et electio Imperatoris ad populum pertinebat, et aliquoties a populo <sup>per se</sup>, aut per senatum facta est: quæ autem a legionibus modo his, modo illis fiebant electiones, non erant ratæ ex jure legionum (nam in vago nomine jus certum esse non poterat) sed ex approbatione populi.

Interpretibus et aliis Scriptoribus vapulat: quorum tamen nonnulli ut heic Gronovius, asperius eum exceperunt, suspicionibusque inquis onerare conati sunt. J. B.

<sup>• Per se, aut per Senatum]</sup> Exempla passim electionum factarum a Senatu aut probatarum in Adriano, Pertinace, Juliano, Severo, Macrino, Maximo, Balbino, Aureliano, Tacito, Floriano, Probo, apud *Dionem, Spartianum, Capitolum, Lampridium, Vopiscum*. Ante Aurelianum sex menses imperium fuit sine principe, ejusque electionem miles senatus detulit iterum atque iterum. Pro Senatus jure egregia Albinus epistola

apud *Capitolinum*, (cap. 13) et Senatus epistola pro Gordianis. (*Apud eudem, Maximin. c. 15.*) Macrinus in oratione: *Detulerunt ad me imperium: cujus ego, Patres conscripti, interim tutelam recipio, tenebo regimen, si et vobis placuerit quod militibus placuit.* (*Capitolin. in ejus vit. c. 6.*) Tacitus Imperator apud Vopiscum in Probo (cap. 7.) *Me quidem senatus principem fecit, de prudenti exercitus voluntate.* Apud eundem Vopiscum Probus: *Recte atque ordine, Patres conscripti, proximo superiore anno factum, ut vestra clementia orbi terrarum principem daret, et quidem de vobis, qui et estis mundi principes,* et

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was, for the greater part of the time, entirely without the circle of the Roman Empire. It appears to me that such a change or translation is not to be presumed, except it be proved by certain documents. I therefore hold that the Roman people is still the same people as formerly, before it received the admixture of strangers; and that the Roman Empire remained in it, as in the body in which it existed and lived. For what the Roman people had formerly a right to do, before the Emperors reigned, it had the right of doing the same, when one Emperor was dead, and another not yet created. And even the election of the Emperor belonged to the people; and was sometimes made by the people, by itself, or by the Senate. And the elections which were made by the Legions, sometimes by one and sometimes by another, were not valid by any rights which the Legions had; (for in so vague a name there could be no certain right;) but through the approbation of the people.

2 It does not make any objection to this view, that by a con-

2 Cum his non pugnat quod Antonini constitutione quotquot in orbe Romano sunt, cives Romani effecti sunt. Consecuti enim ea constitutio sunt subditi Romani imperii ea jura, quae olim habebant coloniae, et municipia, et provinciae togatae, ut et honorum participes essent, et jure Quiritium ute-rentur: non ut in aliis populis itidem ut in populo urbis Romae fons imperii esset: quod facere in potestate Imperatorum non fuit, qui habendi imperii modum ac causam mutare non potuerunt. Nec quod Imperatores postea Constantinopoli quam Romae habitare maluerunt, de jure populi Romani quicquam imminuit: sed tunc quoque electionem factam a parte sui quae Constantinopoli habitabat, unde Byzantinos Quirites vocat Claudianus, ratam populus totus habuit: jurisque sui monu-

*semper fuitis, et in vestris posteris eritis.* (Cap. II.) Majorianus ad senatum in novellis: *Imperatorem me factum, Patres conscripti, vestrae electionis arbitrio et fortissimi exercitus ordinatione agnoscite.* [IV. 3. Suppl. ad fin. Cod. THEODOS. Ed. Gothofred.]

*Fons imperii esset?* Senatus pro Gordiano apud Herodianum provincias hortatur πείθεσθαι Ἦρωας τὸν δημόσιον δικαῖον τὸ κράτος ἐστίν, αὐτάρ τι φίλα καὶ ὑπήκοα ἐκ προγόνων. *Parere Romanis, quorum ab antiquo esset imperium, quibus veteri jure gentes alia amorem obsequiumque præstarent.* (Lib. VII. c. 7. Ed. Bæcl.) Apud eundem

Maximus in allocutione ad milites: οὐ γάρ ἔνδις ἀνδρός ἱδίου κτῆμα ή δρχή, ἀλλὰ κοινὸν τοῦ Ῥωμαίων δῆμου ἄνωθεν, καὶ ἐν ἑκανῃ τῇ πόλει η τῆς βασιλείας ἰδρυται τύχη, ἡμεῖς δὲ διοικεῖν καὶ διέπειν τὰ τῆς ἀρχῆς μεθ' ὑμῶν ἔγκεχειρίσμεθα. Non enim unius viri possessio est hoc imperium, sed antiquitas res est populi Romani: in hac urbe principatus fortuna sita est, nos vero vobiscum, milites, in id electi sumus, ut ea, quae imperii sunt, curemus ac tueamur. (Lib. VIII. c. 7.) Claudianus de Roma: Armorum legumque parens quae fudit in omnes Imperium.

(*De Sec. Cons. Stilic. vers. 136.*)

stitution of Antonine, all the inhabitants of the Roman Empire were made Roman citizens. For by that constitution, the subjects of the Roman Empire obtained those rights which the Colonies formerly had, and the Municipalities (*Municipia,*) and the Togate Provinces, (*Provinciae Togatae;*) namely, that they should participate in the honours of the state, and use the Roman Law (*jus Quiritium:*) but not that the source of Empire should be in other peoples, as it was in the people of the city of Rome; which to do, was not in the power of the Emperors, because they could not change the manner and cause of holding the imperial authority\*.

Nor did it detract any thing from the right of the Roman people,

\* Grotius here sets up one fiction, that, under the Emperors, the right of election was in the people of Rome; and then another fiction, that this first fiction is not to be extended to persons not belonging to the city of Rome, though they had been made Roman citizens. We cannot wonder that he has found opponents in this view, as Gronovius in his Notes.

In Eutrop.  
ll. v. 133.

mentum non tenuerunt servavit <sup>in</sup> in urbis sue prærogativa, <sup>\* et in</sup> honore consulatus aliisque rebus. Quare jus omne, quod hi, qui Constantinopoli habitabant, ad eligendum Imperatorem Romanum habere poterant, pendebat a voluntate populi Romani: et cum illi <sup>y</sup>contra mentem ac morem populi Romani <sup>\*feminæ</sup> Irenes subiissent imperium, ut alias causas omissimus, merito populus Romanus illam concessionem sive expressam sive tacitam revocavit, et per se Imperatorem legit, ac voce primi civis, id est, episcopi sui (quomodo et in Judaica republica, rege non existente, prima erat summi Pontificis persona) pronuntiavit.

<sup>v</sup> In urbis sue prærogativa] Ait Zonaras (in Vit. Constantini) Roma servata πρεσβεῖα, prælationem, quod inde venisset imperium. (Lib. xiii. cap. 3.) Ammianus (Lib. xiv. c. 6) de Roma: *Per omnes tamen quotquot sunt partes ut domina conspicitur et regina.* Claudio Honorio agente Ravennæ (De vi. Cons. Honor. vers. 407):

Quem, precor, ad finem laribus se juncta protestas

Exsultat, imperiumque suis a finibus errat?

<sup>x</sup> Et in honore consulatus] Nam alter consulum ex urbe Romana, et is quidem priorem habebat locum. Procopius in arcana historia. [Cap. 26. ubi de præcedentia Consulis Romani ne γρὺ quidem.]

<sup>y</sup> Contra mentem ac morem populi Romani] Nero in xiv. annalium Taciti (cap. 11) matrem accusat: *Quod consortia imperii, iuraturasque in femine verba prætorias cohortes, idemque decus senatus et populi speravisset.* Priscus in excerptis legationum: οὐ γάρ θηλεῖων, δλλ' δρόμους η τῆς Παιαίκης βασιλειας δρχή: *Non enim feminarum, sed marium est, Romani imperii principatus.* (Pag. 27.) Lampadius post mortem Heliogabali (cap. 18): *Cautum ante omnia, ne unquam mulier senatum ingredetur, utque inferis ejus caput dicaretur devovere turque per quem id eset factum.* Trebellius Pollio Herenniano: *Zenobia usurpato sibi imperio,*

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that the Emperors chose to live at Constantinople rather than Rome. It must be supposed that the election was made by that part of the Roman people which lived at Constantinople (whence Claudian calls the Byzantines *Quirites*,) and confirmed by the whole people. And the Roman people preserved no small monument of its right, in the prerogatives of the city, in the honour of the consulship, and in other things. And therefore all the right that those who lived at Constantinople had to elect the Roman Emperor, depended on the will of the People of Rome. And when the Byzantines had, contrary to the desire and practice of the Roman people, elected a woman, Irene, to the empire, to omit other reasons, the Roman people revoked that concession, express or tacit, and elected an emperor itself; and declared its election by the voice of its First Citizen, that is, its Bishop\*;

\* Here we have a third fiction, that the election of the Byzantine Emperors was made by the Roman citizens at Byzantium, (though the Roman citizens in other cities had not such power of election, by the second fiction;) and a fourth fiction, that it was confirmed by the Roman citizens at Rome: which last fiction is slightly countenanced by the protest against Irene: and a fifth fiction, that

3 Fuit autem hæc electio personalis in Carolum Magnum, et quosdam ejus successores : <sup>a</sup> qui ipsi jus imperii quod habebant in Francos, ut et in Longobardos, a jure imperii in Romanos, ut nova ex causa quæsito, sollicite distinxerunt. <sup>b</sup> Postea vero diviso Francorum populo in occidentalem, qui Galliam nunc obtinet, et orientalem, qui Germaniam sive Alemanniæ tenet (duo Francorum regna vocat Frisingensis) cum populus Francorum orientalis eligendo sibi reges facere cœpisset (<sup>c</sup>nam et ad id tempus Francorum regum successio quasi agnatica, non tam a jure certo, quam a populi suffragiis

*diutius quam seminam decuit, rempublicam obtinuit.* (In xxx. Tyrann. c. 27.)

<sup>a</sup> *Femina Irenæ subiissent imperium*] Dicto etiam ei sacramento, quod habet Zonaras. [Sed vi extorto. Lib. xv. cap. 11.]

<sup>a</sup> *Qui ipsi jus imperii quod habebant in Francos, ut et in Longobardos, a jure imperii in Romanos, ut nova ex causa quæsito, sollicite distinxerunt]* Vide Syndicatum Pontigenensem inter capitula Caroli Calvi. Et Paulum Æmilium Lib. iii. de Carolo Magno.

<sup>b</sup> *Postea diviso Francorum Populo in occidentalem, qui Galliam nunc obtinet, et orientalem, qui Germaniam*] Vide Witikindum libro i. et ibi notata

Meibomii: et pactum Caroli et Henrici post capitula Caroli Calvi, et ad id notas viri magno judicio doctrinaque prædicti Jacobi Sirmundi. Occidentalem illam Franciam Latinam Wibbo vocat, quod ibi sermo Romanensis vigeret, ut et nunc viget, cum Tranarhenane nationes lingua Germanica uterentur.

<sup>c</sup> *Nam et ad id tempus Francorum regum successio quasi agnatica, non tam a jure certo, quam a populi suffragiis peperderat]* Observatum id Prisco in excerpis legationum, et Reginoni ad annum Io cccxvi. Carolus Magnus in testamento: *Quod si filius quilibet horum trium filiorum.*

(as in the Judaic republic before the kings existed, the High-priest was the first person.)

3 This election was a personal election in the case of Charlemagne and some of his successors: who themselves carefully distinguished the right of authority which they had over the Franks and Lombards, from their right over the Romans, as obtained on new grounds. But afterwards, when the Frank people were divided into a western people, which now holds France, or Gallia, and an eastern, which holds Germany or Alemannia; and when the eastern Franks, (the Germans) had begun to elect kings, (for at that time the succession of Frankish kings was *quasi* agnatic, but depended more on popular suffrage than on certain right,) it was agreed by the people

the Pope, as the first citizen of Rome, declared the election made by the Roman People according to their ancient right; which is probably, as Gronovius says, not a view which would have pleased the Pope.

Grotius's scheme does however explain the relation of the Emperor of Germany, the kings of the Romans, and the Pope; and thus makes a jural transition from the ancient to the modern world. W.

pependerat) placuit populo Romano, quo certius præsidium haberet, regem non proprium sibi sumere, sed eum quem Germani fecissent: <sup>d</sup>ita tamen ut jus sibi aliquod retineret probandæ vel improbandæ electionis, quantum scilicet ea res ad se pertinebat.

4 Hæc quoque approbatio per episcopum edici et solemniter testata fieri peculiari coronatione solebat: quare ex electione septem principum, qui Germaniæ corpus referunt, qui lectus est, jus habet imperandi Germanis secundum eorum mores: ex approbatione vero populi Romani fit idem rex, aut Imperator Romanus, aut, ut historici sæpe loquuntur, <sup>e</sup>Rex regni Italiae: atque eo titulo sub se habet quæcumque populi Romani fuerunt, neque pactionibus, aut derelicti occupatione, aut victoriæ jure in aliorum populorum imperium concesserunt:

<sup>d</sup> Ita tamen ut jus sibi aliquod retineret probandæ vel improbandæ electionis] Verissima res, et aperte testata Wibboni vita Conradi Salici.

<sup>e</sup> Rex regni Italiae] Sic in excommunicatione Henrici distincte nominat Papa regnum Teutonicorum et Italiae. Vide Ottonis privilegium Alderano datum, editum a Meibomio post Witi-

kindi Saxonica: et Cranzium Saronicorum v. (cap. 13). In juramento Ottonis quod Gratianus intulit in Distinctionem LXIII. In Roma nullum placitum sive ordinationem faciam de omnibus que ad te (Papam) aut Romanos pertinent, sine tuo consilio. (c. 33.)

<sup>f</sup> Investituras tribuat feudorum Imperii Romani] Nempe ut in imperio

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of Rome, in order that they might be sure of a protector, not to have a king of their own, but the king whom the Germans had elected: yet so that they might retain some power of confirming or annulling the election, so far as they were concerned.

4 This approbation was wont to be proclaimed by the Bishop, and solemnly celebrated by a special coronation, [that of King of the Romans.] Wherefore he who is elected by the Seven Princes who represent Germany, has authority to rule over the Germans according to their usages. But the same person is, by the approbation of the Roman people, made Roman Emperor, or King, or, as historians often speak, King of the kingdom of Italy. And by that title, he has under him whatever belonged to the people of Rome, and that has not passed under the authority of other peoples by compact, or by occupation of derelict, or by the right of conquest.

And hence we easily understand by what right the Bishop of Rome, during the vacancy of the Empire, gives the investitures of the fiefs of the Roman Empire; namely, because he is the first person in the Roman people, which at that time is free. For whatever office belongs to any body, is wont to be discharged by the first person of that body, as we have elsewhere said.

unde illud quoque intelligi facile potest, quo jure episcopus Romanus, vacante imperio, investituras tribuat feudorum imperii Romani, quia scilicet in populo Romano, tali tempore libero, primas obtinet. Solent autem quæ sunt corporis alijcujus <sup>s</sup>per primam personam corporis nomine expediri, ut alibi quoque diximus. Neque vere male Cynus et Raynerius tradidere, si Imperator Romanus morbo aut captivitate imbediretur fungi imperio, posse ei vicarium dari ab ipso populo Romano.

XII. Heredis personam, quoad dominii tam publici quam privati continuationem, pro eadem censeri cum defuncti persona, certi est juris.

XIII. Victor autem victo quatenus succedat, infra in effectibus belli explicabitur.

Germanico Palatinus et Saxo Vicarii imperii, divisitis partibus. Vide Seru-  
num Ludovico XII. (Pag. 505. Ed.  
Paris. 1627.)

<sup>s</sup> Per primam personam corporis nomine expediri] Nam et in Polonia interregno Archiepiscopus Gnesensis Regis locum tenet, in solio regio sedet,

tanquam primus inter Ordines. Philippus Honorius in dissertatione de regno Poloniae. [Immo *De Interregno Poloniae*. Et illa dissertatio est Horatii Spanorchi: quam Phil. Honorius tantum inseruit Thesauro Politico, a se collecto et edito, pag. 426, et seqq. Edit. Francof. 1617. J. B.]

Nor is that unsound which Cynus and Raynerius have laid down, that if the Roman Emperor were prevented from discharging his office by disease or captivity, there might be a substitute for him appointed by the Roman People.

XII. That the person of the heir, as to the continuation both of public and private ownership, is to be conceived as the same with the person deceased, is undoubted law.

XIII. How far the Conqueror succeeds to the Conquered, will be explained below in speaking of the effects of war.

## CAPUT X.

### DE OBLIGATIONE QUÆ EX DOMINIO ORITUR.

- I. *Obligatio reddendas domino rei alienœ undo et qualis.* [Exstantia<sup>1</sup> restituere, et quantum in se est efficere ut reddantur.]
- II. *Non extantibus,] obligatio de reddendo eo quod quis lucrificet ex alieno: quæ multis exemplis illustratur.*
- III. *Bonæ fidei possessorem ad restitutionem non teneri, si res perierit.*
- IV. *Eundem teneri ad restituendos fructus extantes:*
- V. *Et consumtos, nisi alias consumturus non fuerit:*
- VI. *Non eos, quos neglexit percipere.*
- VII. *Non teneri eundem ad restitutionem rei, quam donavit*
- alii, cum distinctione:
- VIII. *Nec si rem emtam vendiderit, similiter cum distinctione.*
- IX. *Quando pretium aut ejus partem servare possit, qui rem alienam bona fide emit.*
- X. *Rem alienam emtam restitui venditori non posse.*
- XI. *Qui rem habet, cuius ignoratur dominus, nemini teneri eam concedere.*
- XII. *Ob causam turpem, aut alioqui debitam, acceptum non esse restituendum naturaliter.*
- XIII. *Refellitur sententia statuens rerum, quæ pondere, numero, mensura constant, dominium sine consensu domini transire.*

I. 1 **E**XPLICATO, quantum instituto nostro sufficit, jure eo quod in personas aut res nobis competit, videntur etiam quæ exinde nascatur obligatio adversum nos. Nascentur autem hæc aut e rebus extantibus (rerum nomine jam

<sup>1</sup> Uncinis heic a me inclusa, in nulla Editionum, quæ vivo Auctore prodierint, immo neque in primis post mortem ejus vulgatis, reperiuntur. *J. B.*

\* *Tenetur is, qui rem nostram habet in sua potestate, efficere quantum in se est, ut in nostram potestatem veniat] In-*

ter precepta jubentia legis Hebreis date est, ut res inventa restituatur domino. Precepto jubente LXXIV. Fundamentum id habet tum in sequitate naturali, tum in Deuteronomio loco XXXII. 1. Chrysostomus 1 Corinth. v. 8. Ταῦτα δὲ καὶ οἱ τῶν ἔξωθεν Ισαῖοι νόμοι,

### CHAPTER X. *Of the Obligation which arises from Ownership.*

I. 1 Having explained, as far as is requisite for our purpose, the Right which we may have over persons or things, we must now see what obligation upon us arises therefrom. Now such obligation arises either from things extant, (including in *things*, *persons*,) or from things not extant.

comprehendam etiam jus in personas, qua utile nobis esse potest) aut non extantibus.

2 E rebus extantibus obligatio hæc nascitur, qua <sup>a</sup>teneatur is, qui rem nostram habet in sua potestate, efficere quantum in se est, ut in nostram potestatem veniat. Quantum in se est, dico; neque enim obligatur ad impossibile, neque ad reddendam rem suis impensis: sed indicare tenetur, ut alter recipere suum possit. Nam sicut in rerum communium statu observanda erat æqualitas quædam, ut huic non minus quam alteri rebus communibus uti liceret; ita introducto dominio hæc <sup>b</sup>quasi societas inter dominos contracta est, ut qui rem

*οἱ τοὺς ἀρκάσαντας καὶ ἀφελομένους  
διέφερτε, ἐκένουσιν κελεύοντιν ἀπαιτεῖν,  
παρ' οἷς ἀν εὐροὶ τις τὰ αὐτοῦ κείμενα  
ἀπάντα. Hoc et saeculi probant leges  
quaæ jus nobis faciunt, omiso raptore  
aut fure, eos compellare qui res nostras  
qualescumque ea sint tenent.* (Tom. III.  
pag. 338. Ed. Savil.) Hieronymus ad Leviticum: *Multi sine peccato putant  
esse, si alienum quod invenerint teneant,  
et dicunt: Deus mihi dedit. Cui habeo  
reddere? Discant, hoc peccatum simile  
esse rapina, si quis inventa non reddit.* [At locus ille non est Hieronymi, sed  
Origenis, ex Hom. IV. in cap. 6. Levit.  
unde versus est; ut in Editione Pithos-  
ana Corporis Juris Canonici observa-  
tum. J. B.] Augustinus Sermone xix.  
de Verbis Apostoli: *Si quid invenisti et  
non reddidisti, rapisti. Deinde: Qui  
alienum negat, si posset et tolleret.  
Utrumque Gratianus retulit in cause  
xii. questionem v. Can. 6. et 8. Idem  
Augustinus de Fide et Operibus (cap.  
7): Sicut jure prædiorum tamdiu quis-  
que bona fidei possessor rectissime dici-  
tur, quamdiu se possidere ignorat alie-  
num; cum vero scierit, nec ab alieno*

*recesserit, tunc mala fidei possessor per-  
hibetur, tunc juste injustus possessor vo-  
cabitur. Pertinet huc et lex Wisigo-  
thorum Lib. IX. tit. 1. c. 9. Interdum  
vero ob causas graves lex civilis intendit  
augetque hanc obligationem, ut in servo  
fugitivo lex Burgundica lib. I. tit. vi.  
Bona quaæ dominis per injuriam ademe-  
rat Domitianus, Nerva restitui jussit.  
Habet id Xiphilinus (pag. 240 c. Ed.  
H. Steph.) Apud Procopium Gothi-  
corum II. Belisarius: *οἵτις δὲ ἔγωγε  
τὸν τε βιασάμενον, καὶ δὲ ἀν τὰ τοῦ  
πέλας ἐκονσίως μὴ ἀποδόψῃ, τὸν αὐτὸν  
ἐκών γε εἴσαι. Mihi ita libertas credere,  
pari loco esse res alienas sponte retinen-  
tem, et non reddentem, cum raptore.*  
(Cap. 6.)*

<sup>c</sup> Nullam societatem, nullum paci-  
tum, heic intelligere necesse est. Vide  
quaæ hac de re, simul et de toto argu-  
mento istius Capitis, diximus in notis  
ad PUENDORFIUM, *De Jure Nat. et  
Gent.* Lib. IV. cap. XIII. alterius Editio-  
nis, ubi omnia accurati exsequunti sum-  
mus, quam in prima Editione, et, ut  
putamus, quam ab ullo adhuc factum  
fuerat. J. B.

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2 From things extant, this obligation arises; that he who has a thing of mine in his power is bound to do so as much as he can that it may come into my power. I say, as much as he can: for he is not obliged to what is impossible, nor to restore the thing to me at his own expense; but he is bound to indicate it, that another may recover what is his. For as in the state of community of things, a certain equality came to be observed, so that one might be able to use those

alienam in sua haberet potestate, eam domino redderet. Nam si dominii ea tantum fuisset vis ut poscenti domino reddendas esset, nimis debile futurum fuisset dominium, et nimis sumtuosa custodia.

<sup>Diod. xv. 20.  
Plut. Pelop.  
p. 280.</sup> 3 Neque hic consideratur bona quis an mala fide rei possessionem nactus sit: alia enim obligatio est ex delicto, alia ex re. Lacedæmonii delicto se liberaverant, damnato Phœbida, qui Cadmeam Thebanorum arcem contra foedus ceperat, sed ipsi <sup>b</sup>injustitiae accusati quod arcem nihilominus retinerent. Eamque injustitiam, ut singularem, etiam singulari Dei providentia vindicatam notavit Xenophon. Sic M. Crassum et Q. Hortensium reprehendit Cicero, quod hereditatis partem retinuissent ex testamento, quod falsum, sed sine eorum culpa, confectum erat.

<sup>Hist. Græc.  
v. 4.  
De Offic. iii.  
12.  
L. Bon. Fid.  
Sl. D. Depos.  
§ 1.</sup> 4 Quia vero hæc obligatio tanquam ex contractu universalis omnes homines tenet, et jus quoddam rei domino parit, eo fit ut singulares contractus, quippe tempore posteriores, exceptionem inde accipient. Inde lucem accipit illud Tryphonini:

<sup>b</sup> *Injustitia accusati*] Ita judicat *Agesilao*: τὴν πόλιν ἐπεισεν εἰς αὐτὴν Δiodorus libro xv. (c. 20). Plutarchus δέξασθαι τὸ δδίκημα, καὶ κατέχειν τὴν

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common things not less than another; so when ownership is introduced, there is a sort of association established among owners, that he who has in his power a thing belonging to another, is to restore it to the owner. For if ownership were only so far effective, that the thing is to be restored to the owner if he asks for it, ownership would be too feeble, and custody too expensive.

3 Nor is it here considered whether a person has obtained possession of the thing *bona fide* or *mala fide*, believing that he has a right, or not: for the obligation from delict (*mala fides*) is one matter, but the thing (and possession of it) is another. The Lacedæmonians tried to free themselves from the delict by condemning Phœbidas who had seized Cadmea, the citadel of the Thebans, in violation of the treaty; but as they, nevertheless, retained the citadel, they were charged with injustice: and this injustice, as being flagrant, was avenged by a singular providence of God, as Xenophon notes. So Cicero blames M. Crassus and Q. Hortensius who had kept possession of legacies by a will which was false, though fabricated without fault of theirs.

4 But because this obligation binds all men, as by a universal contract, and gives a certain right to the owner: hence it comes that special contracts, as later in time, are subject to exception. Hence light is thrown on the case put by Tryphoninus. *A robber took my*

*Latro spolia quæ mihi abstulit, posuit apud Seium inscium de malitia deponentis : utrum latroni, an mihi restituere Seius debeat ? Si per se dantem, accipientemque, intuemur, hæc est bona fides, ut commissam rem recipiat is qui dedit : Si totius rei æquitatem, quæ ex omnibus personis, que negotio isto continguntur, impletur, mihi reddenda sunt, quo (male legitur quo) facto sceleratissimo ademta sunt. Recte autem addit : Et probo hanc esse justitiam, quæ suum cuique ita tribuit, ut non distrahatur ab ullius personæ justiore repetitione. Justior nimurum est repetitio domini ex jure illo, quod ipsi dominio æquævum diximus : unde etiam illud sequitur quod apud eundem Tryphoninum est, ut qui rem suam ignorans depositam accepit, reddere eam non teneatur : et quod ibidem paulo ante quærebatur de bonis depositis ab eo, cuius bona erant publicata, hinc potius quam ex eo quod de penarum utilitate adfert Tryphoninus, definiendum est.*

5 Nam ad dominii naturam nihil refert, ex gentium, an ex civili jure oriatur : semper enim secum habet quæ sibi

*κακητανία δι' εαυτῆς. Κινητού περιεπιφένειαν τοιούτην μίλιον φαίνεται στην Νικόπολη στην Βαζαρέτσια. Η αρχή της περιφένειας βρίσκεται στην Λουνέλαβια σε πλάτη βιβλίου VI.*

*property and deposited it in the hands of Seius, who was ignorant of the crime: ought Seius to restore it to the robber or to me? If we look only at the giver and receiver, bona fides requires that the thing deposited should be restored to him who gave it. If we look at the equity of the whole matter, taking into account all the persons concerned, the property must be restored to me, from whom it was most wrongfully taken. And he rightly adds: I am of opinion that justice requires to give to each man his own in such a way, that it be not again to be transferred by the more just demand of another person. In fact, the claim of the owner is more just, in virtue of that right which we have spoken of as contemporary with ownership. And hence it follows, as we find in the same Tryphoninus, that he who in ignorance has received, as a deposit, a thing which is his own, is not bound to restore it: and the question discussed a little before, concerning things deposited by him whose property had been forfeited, is to be decided on these grounds, rather than by the consideration which Tryphoninus adduces, of the utility of the punishment.*

5 It makes no difference in the nature of ownership whether it arise *jure gentium* or *jure civili*: for it always has along with it the accompaniments which are natural to it: among which is the obligation of every possessor to restore a thing to its owner. And this is

sunt naturalia, inter quæ est obligatio cujusvis possessoris ad rem domino restituendam. Et hoc est quod ait Martianus,  
L. 25. D. de  
act. Rer.  
amot. jure gentium condici posse res ab his, qui non ex justa causa possident.

L. 43. § 2. D.  
de Furt. Ex hoc fonte oritur illud quod ab Ulpiano est proditum, qui rem alienam invenit, eum ita ad eam domino reddendam teneri ut *εὐρετρον*, hoc est, præmium inventionis petere non possit. Reddendi autem sunt et fructus salvis impensis.

Cajet. ad Th.  
2. 3. 62. art. 6.  
L. 20. § 6.  
D. de Pæt.  
Hered. II. 1 De rebus non extantibus hoc humano generi plauit, ut si tu ex re mea factus es locupletior, me rem non habente in tantum, tenearis in quantum es factus locupletior: quia quatenus ex meo lucratius es, plus habes, cum ego minus habeam: introducta autem sunt dominia ad servandam æqualitatem, in eo scilicet, ut quisque suum haberet. <sup>c</sup>Contra naturam esse, ait Tullius, ex hominis incommodo suum augere commodum. Et alibi: *Illud natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus.*

De Offc. III.  
§. Vid. L.  
206. D. de  
Reg. Jur. et  
ibi Interp.  
Immo sord. 2 Est hujus dicti tanta æquitas, ut multa hinc definiantur jurisconsulti extra legum præscripta, semper ad ipsam æqui-

<sup>c</sup> *Contra naturam esse ex hominis in-  
commodo suum augere commodum]* Cas-  
siodorus x. 16. *Hoc nostris temporibus* confitemur inimicum, ut alter alterius latetur incommodo.

what Martinus says, that, *jure gentium*, things may be sued for from him who possesses them without just cause.

From this source arises that which is delivered by Ulpian, that he who finds anything is so far bound to restore it to the owner, that he cannot demand a reward for finding it. Also the produce of the thing found is to be restored, saving the expense.

II. 1 Concerning things not extant, this is the rule established by mankind (the *jus gentium*), that if you are made richer by something which is mine, and which I am deprived of, you are bound to make restitution to the extent of your gain. For by what you have gained from my property, you have so much the more, and I the less. But ownership was introduced to preserve equality, that is, each having his own. So Cicero. [See.]

2 This rule of equity extends so far that the jurists define many points by means of it, without applying rules of law, referring to equity as the plainest ground. Thus a person is held responsible for the acts of a servant whom he has set over a shop, except he have warned people against trusting him. And even when he has given warning, if the servant have only a share in the business, and if the surplus

tatem, ut evidentissimam, provocantes. Ex actu servi insti- *L. Si quis  
Mancip. 17.  
Act. § 1.*  
toris tenetur qui præposit, ita nisi denunciaverit ne ei cre-  
deretur: At etiam si sit facta denunciatio, et servus ex eo  
contractu peculium habeat, aut in rem domini versum sit,  
replicabitur de dolo. *Videtur enim, inquit Proculus, dolum  
malum facere, qui ex aliena jactura lucrum querat.* Ubi  
doli mali vox id omne significat, quod naturali juri et æquitati  
repugnat.

Qui matre jubente pro filii defensore fidejussit, adver- *L. Quem a  
ad sc. Vir.*  
sus defensorem mandati actionem non habet, nec propriæ ejus  
gessit negotium, quia contemplatione matris fidejussit: Atta-  
men ex Papiniani sententia dabitur actio negotiorum gestorum  
(utilis, ni fallor) in defensorem, quia pecunia fidejussoris  
liberatur.

Sic uxori quæ marito pecuniam donavit, quam ex lege *L. Ux. Mar.  
55. D. de  
Don. Int. Vir.  
et Uxor.*  
posset repetrere, datur condicitia aut utilis vindicatio in rem  
ex pecunia comparatam; quia, inquit Ulpianus, locupletiorem  
esse maritum negari non potest: et hoc queritur, quid ex re  
mulieris possideat.

Si consumseris nummos quos mihi meus servus surripue- *L. 30. pr. ver.  
Secund. D.  
de Act. Emt.*  
rat, peculiares putans, condicatio eo nomine mihi adversus te  
competit, quasi res mea ad te sine causa pervenerit.

of profit go to the master, his warning is not held good. *For, says* Proculus, *he appears to act fraudulently (dolo malo) who tries to get gain by the loss of others* (the servant's creditors); where *dolus malus* means anything contrary to natural right and equity.

If a friend, at the request of the mother, have advanced money for the son's agent, he has not properly an action against the agent, for commission discharged or work done; nor was it properly the agent's work which he did; for it was in regard to the mother that he gave his money; yet, according to Papinian, there will lie an (indirect) action for work done, against the agent, because he has been liberated from responsibility by the money of the friend.

If a wife have given money to her husband, which she could by law call back again, she has an action establishing her claim to that which has been bought with the money: for, says Ulpian, it cannot be denied that the husband is the richer by the proceeding: and there is to be an inquiry what he possesses which is his wife's.

If money, which my servant stole from me, you have spent, thinking that it was his own property, I have an action against you, as if my property had come into your hands without any just title to it.

*D. ad.* Pupilli non tenentur commodati secundum leges Romanas; tamen utilis actio dabitur, si pupillus locupletior factus sit.

*script. l. de Pignor.* Sic si aliena res pignori data, et a creditore vendita fuerit, quantum ad creditorem, pro pretii accepti quantitate, liberatur debitor: quia, inquit Tryphoninus, ex quali quali obligatione, occasione debitoris redactum pretium æquius debitori proficiet, quam creditoris lucro cederet: sed emtori debitor tenebitur, ne ex aliena jactura lucrum sibi querat: nam et si majores fructus a possessore creditor abstulisset, universos in quantitatatem acceptos ferre deberet.

*me et ss. D. de Cred.* Similiter si cum debitore meo, non tanquam meo, sed alienum debitorem putans egisti, et mutuam ab eo accepisti pecuniam, obligaris, non quia pecuniam tibi credidi, (hoc enim nisi inter consentientes fieri non potest) sed quia pecunia mea, quæ ad te pervenit, eam mihi a te reddi bonum et æquum est.

*In d. L. ript.* 3 Posteriores quoque juris interpretes ad facta similia hæc recte producunt: nempe ut cuius latitantis bona venum

<sup>3</sup> Non tenetur: quoniam, ut puto, ille, quamdiu fuit bona fide Possessor, secundum Legem Naturalem eadem plane jura habuit, ac si verus Dominus fuisse. Id probavimus ad Caput PUFENDORFIJ jam indicatum: ubi videre poterit Lector, quomodo in plerisque casuum sequentium alias regulas tra-

Wards are not bound to repay loans according to the Roman Law; yet, if the ward thereby become richer, an indirect action will lie.

If a debtor pledge a thing belonging to another, and it be sold by the creditor, the debtor is relieved, in respect to the creditor, to the extent of the price received for the thing: because, says Tryphoninus, whatever be the kind of obligation which the debtor has, the price paid in consequence of the debtor's proceeding, may more equitably go to the debtor's profit, than to that of the creditor. But the debtor will be bound to the buyer, because he is not to gain by another's loss. If the creditor had taken a greater part of the produce than would pay him, he would have to account for the whole which he had received.

In like manner, if you dealt with my debtor, not as thinking him indebted to me, but to another person, and borrowed money of him, you are bound to me; not because I have entrusted money to you; (for this cannot be done without mutual consent;) but because my money, which has made its way to you, it is fair and equitable that you should render to me.

3 The later jurists extend these principles to other similar cases: for instance, that if a person have absconded and his goods have been

ierant, cum exceptionem haberet, is ad pecuniam ex bonis suis redactam admittatur; et ut qui pecuniam patri credidit ad alendum filium, si pater solvendo non sit, in ipsum filium bona materna habentem actionem habeat.

His regulis duabus recte intellectis, non difficilis erit responsio ad eas quæstiones quæ et a Jurisconsultis, et a Theologis internum animi tribunal instruentibus, proponi solent.

III. Primum enim apparet, bonæ fidei possessorem (nam malæ fidei possessor, ultra rei rationem, ex facto suo tenetur) non teneri ad ullam restitutionem si res perierit: quia nec res ipsa apud eum est, nec lucrum ex re.

IV. Secundo, bonæ fidei possessorem teneri ad restituendos <sup>3</sup>etiam fructus extantes rei: dico fructus rei; nam industria fructus etiam si sine re non procederent, rei tamen non debentur. Causa hujus obligationis est ex dominio: nam qui dominus est rei, idem naturaliter dominus est fructuum rei.

V. Tertio, bonæ fidei possessorem teneri ad restitutionem damus, e principio simplicissimo et facillimo fluentes; quum definitiones Auctoris nostri satis inter se non cou-

Soto, l. iv. q.  
7. art. 2.  
Covar. ad c.  
Pecc. par. II.  
§ 1.  
Silv. in Verb.  
Recit. n. 3.  
q. 6  
Medina de  
Contr. q. 10.  
Lesc. ii. 14.  
Navar. 17.n.7

sold, when he had a case which would have protected them, he is to be admitted to the money raised by the sale: and he who has lent money to support the son, if the father be insolvent, and the son have maternal property, has an action against the son.

These two rules being rightly understood (for extant and non-extant property), the answer will not be difficult to the questions which are wont to be proposed by Jurists and by Theologians, writing for the instruction of the internal tribunal of the mind.

III. In the first place, it appears that a *bona fide* possessor is not bound to any restitution, if the thing be destroyed; for he neither has the thing nor any gain from the thing: [a *mala fide* possessor is bound by his own act, besides the consequences of wrong doing.]

IV. Secondly, a *bona fide* possessor is bound to restore also the still extant produce of the thing: I say the produce of the thing; for the produce of industry, even if it would not take place without the thing, is not due to the thing. The cause of this obligation is ownership: for he who is owner of a thing is naturally owner of the fruits of the thing.

V. Thirdly, that a *bona fide* possessor is bound to restitution both of the thing and of the produce of it consumed by him, if in any case he would have consumed as much: for by so much he is

Sext. 16.

et rei, et fructuum consumtorum, si modo alias quoque tantundem consumturus fuerat: nam in hoc locupletior censemur. Sic laudatur circa initia imperii C. Cæsar Caligula, quod quibus regna restituit, adjecit et fructus medii temporis.

VI. Quarto, non teneri eum ad restituendos fructus quoq[ue] percipere neglexit: quia nec rem habet, nec quicquam quod rei loco succedit.

VII. Quinto, si talis possessor rem sibi donatam alii donaverit, non teneri eum nisi omnino etiam sine hac re donatus tantundem fuisset: tunc enim lucrum erit rei suæ pepercisse.

VIII. Sexto, si rem emtam vendiderit, non teneri, nisi quatenus forte pluris vendiderit: quod si donatum vendiderit, teneri ad restituendum pretium, nisi forte prodegerit pretium, alias non producturus.

*P. 14. l. 42.  
§. 22. D. de  
P. 22. D. de  
L. 22. D. de  
Pet. Hor. L.  
22. ad  
L. 23. D. de  
Rab. Ord.*

IX. 1 Septimo, rem alienam bona fide emtam restituendam, nec posse erogatum pretium repeti: cui regulæ hæc

*L. 3. 22. C. de  
Rei Vind.  
L. 16. C. de  
Evict.*

*Nisi quatenus dominus rei sua possessionem recipere sine impedio aliquo probabiliter non potuit* Apud Terentium *Heautontimorumenos* Act. iv. Scena iv. (vers. 42. et seqq.)

Sed illud quod tibi

Dixi de argento quod ista debet Bacchidi;

Id nunc reddendum est illi: neque tu scilicet  
Eo nunc confuges; quid mea? num mihi datum est?

Num just? num illa oppignerare filiam  
Meam me invito potuit? verum illud, Chremo,  
Dicunt: jus sumnum sepe summa est malitia.

Ubi et Eugrafium vide. Hæc aequitas

held to be richer. And accordingly Caligula is praised for having, in the beginning of his reign, when he restored governments to persons, given them also the income of the interval elapsed.

VI. Fourthly, a *bona fide* possessor is not bound to restore the produce which he neglected to take; for he neither has the thing, nor anything which has come into its place.

VII. Fifthly, if a *bona fide* possessor has given to another a thing given to himself, he is not bound to restitution, except, in any case, without having this thing, he would have given something of equal value: for then he has gained by sparing his own property.

VIII. Sixthly, if he sell a thing which he have bought (belonging to another), he is not bound\*, except in so far as he sold it for more than he gave for it. If he have sold a thing given to him (belonging to another) he is held to restore the price; except it happen that he have spent the price, and would not otherwise have spent the money.

\* These two Rules do not agree well together: according to the seventh, a thing belonging to another, which we have bought *bona fide*, we must restore to the owner, not requiring the price from him; according to the sixth, if we have bought it, and then sold it, we are not bound to restore the price. It appears to be assumed, in the seventh Rule, that we have a remedy against the seller. W.

addenda mihi videtur exceptio, <sup>d</sup>nisi quatenus dominus rei suæ possessionem recipere sine impedio aliquo probabiliter non potuit, ut puta si res apud piratas fuerit. Tunc enim deduci poterit quantum dominus impensurus libenter fuerat: ipsa enim facti possessio, præsertim recuperatu difficultis, est aliquid æstimabile, et in hoc dominus post rem amissam censetur factus locupletior. Et ideo cum rei suæ emtio ordinario jure non valeat, valere tamen eam ait Paulus Jurisconsultus, si ab initio id convenit, ut possessio quæ apud alterum est ematur. Neque hic requiro ut emta res sit <sup>e</sup>cum animo ut domino restitueretur, quo casu negotiorum actionem nasci, sunt qui aiant, sunt qui negent. Nam negotiorum gestorum actio ex lege civili nascitur: nullum enim habet eorum fundatorum, ex quibus natura obligationem inducit. Nos autem id quod naturale est hic quærimus.

2 Non dissimile est quod de funeraria scripsit Ulpianus, justum judicem in ea non meram negotiorum gestorum actio-

etiam ab Hebreorum magistris probatur, et a Wisigothis libro ix. tit. i. c. 9. et c. 14. Alc. iii. Pœsa. 29. Menoch. v. Pœsa. 29. num. 26. Stracham parte 11,

num. 18.

<sup>e</sup>Cum animo ut domino restitueretur] Speculum Saxonicum 11, 37. Landrecht tit. xv.

L. Suæ, 16.  
D. de Contr.  
Emt.  
L. Si in Emt.  
34. § Ret. 4.  
D. de Contr.  
Emt.  
L. Si Labor.  
2. § Si Nav.  
3. ad Leg.  
Rhod. Vid.  
Ægid. Rep.  
Diph. 31. dub.  
7. num. 195.  
Host. Tit. de  
Pœsa. v. quid  
de Preced.  
Emt.  
Bal. et Cast.  
l. i. D. de  
Neg. Gest.  
L. et si quis,  
14. § item  
Lab. 13. D.  
Relig. et s. f.  
Balæ. ad can.  
X. Greg.  
Thaum.

IX. 1 Seventhly, a thing belonging to another which has been *bona fide* bought, is to be restored, and the price paid cannot be demanded back\*. To which rule it seems to me that this exception should be made;—except in so far as the owner could not probably recover possession of his thing without some expense; as, for example, if it were in the hands of pirates: for then we may deduct as much as the owner would willingly have expended on it. For the actual possession of a thing, especially of a thing difficult to recover, is of itself a valuable matter, and in this the owner, after he has lost the thing [and recovered it] is richer than he was before. And therefore though the buying of a thing which is one's own is not valid by ordinary law, yet Paulus says that it is valid, if it be agreed from the first that the possession which another has of it may be bought. Nor do I here require that the thing should be bought with a purpose of restoring it to the owner, in which case an action for agency would lie. Some hold one way, some the other. For the action for agency is the creation of the Civil Law, and has none of those foundations by means of which nature induces obligation. And we are here inquiring what is Natural Law.

2 Ulpian's opinion respecting funeral expenses is of the same kind; that a just judge in such cases does not merely imitate the effect of an action for agency, but follows equity in a larger manner, the

nem imitari, sed solutius æquitatem sequi, cum hoc ei actionis  
 natura indulgeat. Et quod alibi idem ait, si quis negotia mea  
 gesserit, non mei contemplatione, sed sui lucri causa, et circa  
 res meas aliquid impenderit, non quidem in id quod dedit, sed  
 in id quod ego locupletior sum, habiturum actionem. Sic  
 enim et domini rerum, quarum jactu levata est navis, partem  
 recuperant ab aliis, quorum res jactu servatæ sunt: quia et  
 qui rem alioqui peritaram servavit, in hoc videtur locu-  
 pletior.  
L. Si Pupill. 6.  
§ sed si quis.  
3. D. de Neg.  
Gest.  
Cajet. 2. 2.  
62. 6.  
Soto. 1. 4. q.  
7. art. 2.  
Covar. d.  
loco.  
L. I. D. ad L.  
Rhod.

X. Octavo, eum, qui rem alienam emit, non posse eam  
 restituere venditori ut pretium servet, quia ex quo res in ejus  
 fuit potestate, jam, ut diximus, cœpit obligatio restituendi.

XI. Nono, eum qui rem habeat, cuius dominus igno-  
 ratur, non teneri naturaliter eam rem pauperibus dare: 'quan-  
 quam valde hoc pium sit, et recte multis in locis constitutum.  
 Ratio est, quia ex dominio nemo jus habet præter dominum.  
 Non esse autem, et non apparere, tantundem valent quoad eum  
 cui non apparent.

<sup>4</sup> Heic enim, in omnibus Editionibus,  
 positum pro etiam, errato, ut mihi vide-  
 tur, typographicò, quem tamen Auctor  
 non animadvertis. Certe est id novum  
 exemplum, non ratio jam dictorum.  
 J. B.

<sup>1</sup> Quanquam valde hoc pium sit] Chry-  
 sostomus indicato jam loco. (In 1 Co-

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nature of the action allowing him to do so. And what the same writer elsewhere says, if any one has transacted business for me, not having a regard to me, but for the sake of his own gain, he may have an action, not for all that he has expended, but for the amount by which I am richer. And so the owners of goods which are thrown overboard to lighten the ship, recover a part from the others whose goods are saved by that proceeding; for a person who preserves, by any step, his property which was in danger of perishing, is by so much the richer.

X. Eighthly; the person who has bought a thing belonging to another, cannot restore it to the seller to save himself the price: because, as soon as the thing is in his possession, the obligation of restoring it has begun.

XI. Ninthly; he who has a thing the owner of which is unknown, is not naturally bound to give it to the poor: although this is a very pious course, in many places properly ordered. The reason is, because, in virtue of ownership, no one has a right except the owner. But that there is no owner, and no apparent owner, is the same thing to him to whom he is not apparent.

XII. Tenthly, by Natural Law, what is received either for a shameful cause, or for an honest cause to which any one was bound, [without reward] is not to be restored: though such a rule is not un-

XII. Decimo, naturaliter quod ob causam turpem aut honestam, ad quam quis obligabatur, acceptum est, non esse restituendum, quanquam hoc quoque non immerito legibus quibusdam introductum est. Ratio est, quia ratione rei nemo tenetur, nisi res sit aliena; hic autem dominium transit ex prioris domini voluntate. <sup>¶</sup>Aliud erit si in ipso accipiendo modo vitium fuerit, puta extorsio: hoc enim est aliud obligationis principium, de quo hic non agimus.

XIII. Addamus et hoc mendose a Medina traditum, re-<sup>De Rent. q. 10.</sup> rum alienarum in nos dominium transire sine consensu domini, si res sint tales, quæ pondere, numero, et mensura æstimari soleant. Nam res ejus generis functionem quidem recipere dicuntur, id est, restitui posse per id quod genere idem est, sed ita demum si consensus præcesserit, aut ex lege aut more præcessisse intelligatur, ut in mutuo; aut etiam si res, utpote consumpta, exhiberi nequeat. At extra talem consensum, vel <sup>L. Rogast. 2.</sup> expressum, vel præsumptum, et extra necessitatem functio ista <sup>§ ult. D. de  
Reb. Cred. et  
si Cert.</sup> locum non habet.

(rinth. v. 8.)

<sup>¶</sup> Aliud erit si in ipso accipiendo modo vitium fuerit, puta extorsio] Op-

time hæc distinguit Augustinus epistola

LIV. (quæ est CLIII. novæ Edit. BENE-  
dictin.)

reasonably introduced by some laws. The reason is, that no one is bound by the reason for which the thing is given, except it be a thing belonging to another: but in the case now supposed, the ownership passes in virtue of the will of the former owner. It is another matter if there be something wrong in the mode of acquisition; for instance, extortion: for this is another principle of obligation, concerning which we do not now speak.

XIII. Let us add also this, erroneously ruled by Medina: that the ownership of things belonging to others may pass to us without the consent of the owner, if they are such things as are commonly valued according to number, weight, and measure. Things of this kind are said *functionem recipere*, to be such that our portion may pass for another, so that they may be restored by means of that which is not identical, but only the same in kind. But this can be done only when consent has preceded, or may, by law or usage, be understood to have preceded, as in lending; or if the thing, being consumed, cannot be exhibited. But without such consent, express or presumed, and without necessity, that *function* has no place.

## CAPUT XI.

### DE PROMISSIS.

- |       |  |        |  |
|-------|--|--------|--|
| I.    | <i>Refellitur sententia statu-<br/>ens ex promissis jus natura-<br/>liter non oriri.</i>   | XI.    | <i>Modus valido promittendi<br/>per nos ipsos.</i>   |
| II.   | <i>Assertionem nudam non<br/>obligare.</i>   | XII.   | <i>Modus valido promittendi<br/>per alios; ubi et de legis<br/>mandata excedentibus.</i>   |
| III.  | <i>Pollicipationem naturaliter<br/>obligare, sed inde alteri jus<br/>non nasci.</i>  | XIII.  | <i>Exercitoria et institutoria ob-<br/>ligationes quatenus ex jure<br/>naturae procedant, ubi et<br/>juris Romani error no-<br/>tatur.</i> |
| IV.   | <i>Quid sit promissum unde<br/>alteri jus oritur.</i>  | XIV.   | <i>Ad promissionis validita-<br/>tem acceptationem requiri.</i>  |
| V.    | <i>Requiri ad hoc in promit-<br/>tente usum rationis: ubi<br/>distinguitur jus naturale a<br/>legibus civilibus circa mi-<br/>nores.</i> | XV.    | <i>An acceptatio innotescere<br/>debeat promissori, per dis-<br/>tinctionem explicatur.</i>  |
| VI.   | <i>Promissio errantis an et<br/>quatenus obliget naturaliter.</i>  | XVI.   | <i>Revocari promissionem pos-<br/>se, mortuo ante acceptatio-<br/>nem cui promissum erat.</i>  |
| VII.  | <i>Promissionem ex metu ob-<br/>ligare, sed qui metus cau-<br/>sam dedit, teneri ad liber-<br/>andum promissorem.</i>                    | XVII.  | <i>An et internuntio mortuo,<br/>per distinctiones explicatur.</i>   |
| VIII. | <i>Id quod promittitur, ut<br/>promissio valeat, oportere<br/>in potestate sit promittentis.</i>   | XVIII. | <i>An revocabilis sit promis-<br/>sio, acceptione per alterum<br/>facta, per distinctiones ex-<br/>plicatur.</i>                           |
| IX.   | <i>An promissio ob causam<br/>vitiosam valeat naturaliter,<br/>per distinctionem ex-<br/>plicatur.</i>                                   | XIX.   | <i>Onus promisso adjici quo<br/>tempore possit.</i>  |
| X.    | <i>Quid sentendum de pro-<br/>missione facta ad conse-<br/>quendam rem jam ante<br/>debitum.</i>   | XX.    | <i>Quomodo convalescere pos-<br/>sit invalida promissio.</i>   |
|       |  | XXI.   | <i>Promissiones sine causa<br/>naturaliter non esse irritas.</i>   |
|       |  | XXII.  | <i>Qui factum alienum pro-<br/>misit ad quid naturaliter<br/>teneatur.</i>   |

I. 1 **P**ERDUXIT nos ordo ad obligationem quæ ex pro-  
missis oritur: ubi statim se nobis objicit vir erudi-  
Lib. 1.6; v. 1. tionis minime vulgaris Franciscus Connarus. Is enim hanc

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### CHAPTER XI. Of Promises.

I. 1 The order of our work has led us to the obligation which arises from promises. And here we at once find opposed to us a man

defendit <sup>1</sup>sententiam, jure naturæ ac gentium ea pacta, quæ non habent συνάλλαγμα, nullam inducere obligationem: honeste tamen impleri, si modo talis res sit, quam præstare etiam citra promissum honestum ac virtuti alicui congruens fuerat.

2 Adfert autem pro sententia sua non tantum Jurisconsultorum dicta, sed et rationes has: quod non minor sit culpa ejus qui temere nulla de causa pollicenti credit, quam ejus qui vanitatem adhibuit promissionis: deinde quod fortunis omnium magnum immineat periculum, si promisso, quod sæpe ex ostentatione magis quam ex voluntate proficiscitur, aut ex voluntate quidem, sed levi ac parum considerata, tenerentur homines: postremo, quod justum fuit aliqua honestati cuiusque relinquere, nec ad necessitatem obligationis exigere: turpe esse promissa non implere, non quod injuste id fiat, sed quod detegatur promissionis levitas.

Tullii quoque utitur testimonio, qui dixerit, nec promissa servanda, quæ sint iis quibus promiseris inutilia, nec si plus tibi noceant, quam illi prosint cui promiseris.

Quod si res integra non sit, vult deberi non quod pro-

<sup>1</sup> Confer PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. III. cap. 5. § 9. et seqq. J. B.

of no ordinary erudition, Francis Connarus. For he maintains this opinion, that, *jure naturæ ac gentium*, those pacts which have not a consideration (*συνάλλαγμα*), do not induce any obligation; though no doubt they may be properly fulfilled, if the matter be such as it would have been, without promise, proper and congruent to some virtue to perform.

2 He adduces for his opinion not only the *dicta* of jurists, but also these reasons: (1) That there is a fault no less in him who rashly trusts a person who makes a promise for no cause: (2) That there is a great danger thrown upon the fortunes of all, if men be judged to be bound by a promise, which often proceeds more from ostentation than from real purpose; or from a purpose, but a light and inconsiderate one: (3) That it is right to leave something to each person's honesty, and not to bind men to the necessity of an obligation:—that it is disgraceful not to fulfil promises, not because such a course is unjust, but because thereby the levity of the promise is detected.

He also uses the authority of Cicero, who says, that promises are not to be kept when they are useless to those to whom they are made; nor if they do more harm to you than good to those to whom you made them. (*De Off.* i. 10.)

If the matter be no longer open, in consequence of some step

L.

II.

III.

missum est, sed quod interest: ceterum pacta, quam ex se non habent vim, eam accipere aut ex contractibus, quibus insunt aut adjiciuntur, aut ex rei traditione: unde nasci partim actiones, partim exceptiones, et vetitam repetitionem.

Quæ vero pacta vim obligandi secundum leges habeant, ut pacta stipulata, et alia quædam, habere eam legum beneficio, quarum ea est efficacia, ut quod per se honestum est, id efficere possint etiam necessarium.

3 Verum hæc sententia, ita generaliter ut ab ipso effertur accepta, consistere non potest. Primum enim sequitur inde inter reges et populos diversos, pactorum, quamdiu nihil ex iis præstatum est, vim esse nullam, præsertim iis in locis, ubi nulla certa forma fœderum aut sponzionum reperta est. Tum vero ratio nulla reperiri potest, cur leges, quæ quasi pacatum commune sunt populi, atque hoc nomine vocantur ab Aristotele et Demosthene, obligationem pactis possint addere; voluntas autem cuiusque, hoc omni modo agentis ut se obliget, Pet. est. L. 2. idem non possit, præcipue ubi lex civilis impedimentum non D. de Ley. affert. Adde quod, voluntate sufficienter significata, transferri rei dominium potest, ut ante diximus: quid ni ergo

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having been taken, he pronounces that what you ought to do, is not what is promised, but what is for the interest of the promisee:—that the pacts, not having any force of themselves, receive force from the contracts of which they are parts or additions, or from the delivery of the thing in question; whence arise, partly actions, partly exceptions to actions, and prohibitions of suit.

But pacts which have an obligatory force according to the Laws, as pacts with stipulations and some others, have, he holds, this force by the help of the laws, which have this efficacy, that what of itself is proper, they make to be necessary.

3 But this opinion cannot stand, in the general form in which he propounds it. For, in the first place, it follows therefrom that pacts between kings and different peoples, so long as nothing thereof is performed (*re integrâ*) have no force; [the parties being bound by no common instituted law,] especially in those places in which no regular form of treaties and engagements has been introduced.

And again, no reason can be found why laws, which are in a certain way a common pact of the people, and are so called by Aristotle and Demosthenes, should be able to give obligatory force to pacts; while the will of a person, directed especially, and by every means, to put himself under an obligation, should not be able to do so; especially when the Civil Law offers no impediment.

Rhet. I. 1A.  
Orat. I. adv.  
Aristop. p.  
492. C. unde.  
Pet. est. L. 2.  
D. de Ley.

possit transferri et jus in personam, aut ad transferendum dominium (quod jus ipso dominio minus est) aut ad aliquid agendum, quippe cum in actiones nostras par jus habeamus atque in res nostras?

4 Accedit his <sup>\*</sup>sapientum consensus: nam quomodo dicuntur a Jurisconsultis, nihil esse tam naturale, quam voluntatem domini volentis rem suam in alium transferre ratam haberi; eodem modo dicitur, nihil esse tam congruum fidei humanæ, quam ea quæ inter eos placuerunt servare. Sic edictum de pecunia constituta, ubi nulla in constitente debendi causa præcesserat præter consensum, favere dicitur naturali æquitati. Paulus quoque Jurisconsultus eum ait natura debere, quem jure gentium dare oportet, cuius fidem secuti sumus: quo in loco primum vox, *oportet*, necessitatem quandam moralem significat: neque vero admittendum est, quod ait Connarus, fidem secutos nos censeri, ubi res integra esse desiit: agebat enim eo loco Paulus de condicione indebiti: quæ cessat si ex qualicunque pacto solutum quid sit,

<sup>\* Sapientum consensus]</sup> Ita ut et si-  
lentium in re moram non ferente vim  
sponsionis habere velint Iudei. *Baba*

*Kama* cap. x. § 4. [Vide ibi *Commen-*  
*tar. Constantini Lempereur.*]

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Add to this, that when the will is sufficiently signified, the ownership of a thing may be transferred, as we have already said: why then may there not also be a transfer of a *jus in personam*, a right to the performance of a person's promise, or a right to transfer ownership (which is a less thing than ownership itself,) or a right to do anything; since we have the same right over our actions as over the things which belong to us?

4 To this is to be added the consent of wise men; for as it is said by jurists, that nothing is so natural as that the will of the owner when he wishes to transfer to another a thing which is his, should be held valid; in the same way it is said that nothing is so congruous to the mutual confidence of mankind, as to perform the agreements which have been made among men. Thus the edict concerning paying money agreed to be paid at a certain time, when in the person so agreeing no cause had preceded except consent, is said to favour natural equity. Paulus also says, that a man owes us a debt, when, *jure gentium*, he ought to give it us, we relying upon his good faith; in which place, first, the word *ought* implies a certain moral necessity: nor can we admit what Connarus says, that we rely upon a man's good faith, only when some step has been taken in agreement with the promise: for in that place Paulus was speaking of an action for recovering what has been paid and was not owing: which falls to the ground, if the

quia jam ante, re adhuc integra, naturæ ac gentium jure dari oportebat, etiamsi lex civilis ad præscindendas litium occasiones auxilium suum non præstabat.

*De Offic. 1. 7.*

*Lib. I. Od. 24.* 5 M. autem Tullius in *Officiis* tantam promissis vim tribuit, ut fundamentum justitiae fidem appellat, quam et justitiae sororum dixit Horatius, et Platonici sœpe justitiam vocant *App. de Hab. Plat. Docr. II. p. 18. in fin. Apud Plat. 1. De Rep. p. 331 c. d.* *ἀληθειαν*, quod fidelitatem transtulit Apuleius : ac Simonides justitiam definiebat, non modo acceptum reddere, sed et verum dicere.

6 Sed ut bene res intelligatur, <sup>2</sup> distinguendi sunt diligenter tres gradus loquendi de rebus futuris quæ nostræ sunt potestatis, aut fore putantur.

II. Primus gradus est assertio explicans de futuro animum qui nunc est: et ad hanc, ut vitio careat, requiritur veritas cogitationis pro tempore præsenti, non autem ut in ea cogitatione perseveretur. Habet enim animus humanus non tantum naturalem potentiam mutandi consilium, sed et jus. Quod si in mutatione sententiae vitium sit aliquod, aut accedit, id non est intrinsecum mutationi, sed ex materia, puta quia prior sententia erat melior.

<sup>a</sup> Vide, in hanc rem, PUFENDORF. <sup>b</sup> *Deum ipsum*] Ita Baldus in Lib. I. *De Jure Nat. et Gent. Lib. III. cap. 5. D. de Pactis.*  
§ 5. et seqq. J. B.

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money be paid in virtue of a compact of any kind whatever: for then, even before any step had been taken (*re adhuc integra*), by Natural Law and *jure gentium*, it ought to be paid; even if the Civil Law did not lend its aid, to cut off occasions of litigation [by stopping the action after it has been paid].

5 Cicero, in his *Offices*, gives so much weight to promises, that he calls good faith the foundation of justice. So Horace: and the Platonists often call Justice, *Truth*, or *Truthfulness*, which Apuleius translates *Fidelitas*. Simonides, as quoted in Plato's *Republic*, says that justice is, to return what is entrusted to us, and to speak the truth.

6 But in order that the thing may be well understood, there are three ways of speaking concerning the future, which must be carefully distinguished.

II. The first degree is an assertion explaining our present purpose with respect to some future action: [*I intend to give you:*] and that this may be free from fault, a requisite is, a truth of the thought for the present time, but not that the thought be persevered in. For the human mind has not only a natural power of changing its purpose, but also a right. And if there be any fault in the change,

III. Secundus gradus est, cum voluntas se ipsam pro futuro tempore determinat, cum signo sufficiente ad indicandam perseverandi necessitatem. Et haec pollicitatio dici potest, quæ seposita lege civili obligat quidem, aut absolute, aut sub conditione, sed jus proprium alteri non dat. Multis enim casibus evenit, ut obligatio sit in nobis, et nullum jus in alio: sicut in debito misericordiæ et gratiæ repnendæ apparet, quibus simile est hoc debitum constantiæ sive fidelitatis. Itaque ex tali pollicitatione res pollicitantis retineri, aut is ipse qui pollicitus est ad implendam fidem cogi jure naturæ non poterit.

IV. 1 Tertius gradus est, ubi ad determinationem tam accedit signum volendi jus proprium alteri conferre: quæ perfecta promissio est, similem habens effectum quam alienatio domini. Est enim aut via ad alienationem rei, aut alienatio particulæ cuiusdam nostræ libertatis. Illuc pertinent promissa dandi, huc promissa faciendi. Ejus quod dicimus insigne nobis argumentum præbent divina oracula, quæ nos docent <sup>b</sup>Deum ipsum, qui nulla constituta lege obstringi

or accessory to it, that is not intrinsic to the change, as a change, but belongs to the matter; for instance, if the first intention was the better of the two.

III. The second degree is, when the will determines itself for a future time, with a sufficient sign to indicate the necessity of persevering [*I will give you*]. This may be called *pollicitation*; it is obligatory without the Civil Law, either absolutely or conditionally, but it does not give to another person a proper right\*. For in many cases it happens that there is an Obligation in us, and no corresponding Right in another: as appears in the duties of mercy and gratitude; and to these, the duty of constancy or fidelity is similar. Therefore in virtue of such pollicitation, the thing so promised cannot be retained, or he who made the promise be compelled by Natural Law to fulfil it.

IV. 1 The third degree is, when to such a determination is added a sign of wishing to confer a proper right upon another: [*I promise you*:] which is a perfect promise, with the same effects as alienation of ownership. For it is either a way to the alienation of the thing, or it is an alienation of some portion of our liberty. To the former head belong promises to give, to the latter, promises to do.

A strong example of what we say is furnished by the Scriptures, which teach us that God himself, who cannot be compelled by any

\* It is better to use *Obligation* only as correlative to *Right*, and *Duty* when there is no such correlative Right, but a moral claim. *E. M.* 84, 89.

potest, contra naturam suam facturum nisi promissa præstaret. Neh. ix. 8; Heb. vi. 18, et x. 23; 1 Cor. i. 9, x. 13; 1 Thess. v. 24; 2 Thess. iii. 3; 2 Tim. ii. 13. Unde sequitur, ut promissa præstentur venire ex natura immutabilis justitiae, quæ Deo et omnibus his qui ratione utuntur, suo modo communis est.

*Prov. vi. 1.*

Accedit judicium Salomonis: *Fili mi, si quid spopondisti alteri, defixisti externo volas tuas, illaqueatus es verbis oris tui: captus es enuntiationibus oris tui.* Et hinc Hebreis promissio vocatur ἔντον vinculum, et <sup>c</sup> voto comparatur, Num. xxx. 4, 5, 6. Similis origo vocis ὑποσχέσεως notata Eustathio ad secundum Iliados: ἀλίσκει γάρ πώς καὶ κατέχει τὸν ὑποσχόμενον ὁ τὴν ἐπαγγελίαν δεξάμενος. <sup>d</sup> *Capit ac vincit quodammodo promissorem is, cui fit promissio.* Quem sensum non male secundo *Metamorphoseon* expressit Ovidius, ubi promissor ei cui promiserat ait: *Vox mea facta tua est.*

2 His cognitis non difficuler respondebimus ad Connani argumenta. Nam jurisconsultorum dicta de pactis nudis respiciunt <sup>e</sup> id, quod Romanis legibus erat introductum, quæ deliberati animi signum certum constituerunt stipulationem. Neque negamus similes esse in aliis populis leges. *Quæ lex*

<sup>c</sup> *Voto comparatur]* Quasi paci-  
cuntur cum Diis homines oblatione voto-  
rum. Schol. Horatii. (In III. Od. 29.  
v. 59.)

<sup>d</sup> *Capit ac vincit]* Inde vincula fidei  
dicta. Donatus ad *Eunuchum*. (Act. I.

Sc. 2. vers. 22.)

<sup>e</sup> *Id, quod Romanis legibus erat in-  
troducedum]* Cautè Paulus *Sententiarum*,  
Lib. II. Tit. 14. *Si pactum nudum de  
præstandis usuris interpositum est, nul-  
lius est momenti: ex nudo enim pacto*

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instituted law, would act contrary to his nature, except he performed his promises. [See the passages.] Whence it follows, that the performance of promises proceeds from the nature of immutable justice, which is, in a certain way, common to God and to all rational creatures. So *Prov. vi. 1.* A promise is spoken of as indissoluble: and a vow. *Numb. xxx. 4, 5, 6.* So the word ὑπόσχεσις is explained by Eustathius. So Ovid. [See.]

2 This being understood, we shall have no difficulty in replying to Connanus's arguments. For the *dicta* of jurists respecting nude pacts regard the rule which was introduced by the Roman laws, which made *stipulation* the certain sign of a deliberate purpose. Nor do we deny that similar laws existed in other nations. *What law obliges us to perform what we have promised to any one?* says Seneca, speaking of human law [Natural Law], and a promise not made with formal solemnity.

*ad id præstandum nos quod alicui promisimus obligat?*  
 ait Seneca de lege humana et <sup>V. de Benef. c. 21.</sup> 'promisso non solenniter facto loquens.

3 Possunt autem naturaliter deliberati animi alia esse signa præter stipulationem, aut si quid ei simile ad actionem parviendam lex civilis postulat. Quod autem fit animo non deliberato, id nos quoque ad vim obligandi non credimus pertinere; quod et Theophrastus libro de legibus notaverat: <sup>Apud Stob. Serm. 44.</sup> imo et quod deliberato fit, sed non eo animo ut jus proprium concedat alteri, ex eo negamus jus exigendi cuiquam naturaliter dari, quamquam non solam hinc honestatem, sed et necessitatem quandam moralem nasci agnoscimus. De eo autem quod ex Cicerone adducitur agemus infra, ubi de interpretatione pactorum sermo erit. Sed quæ ad perfectæ permissionis vim <sup>3</sup>requirantur videamus.

V. 1 Primum requiritur usus rationis: ideo et furiosi, et amentis, et infantis nulla est promissio. Aliud censendum de minoribus, hi enim etsi non satis firmum judicium habere credantur, ut et fœminæ, id tamen nec perpetuum est, nec per se sufficit ad actus vim elidendam.

2 Quando autem puer ratione uti incipiat, non potest

*inter cives Romanos actio non nascitur.* § 1.

<sup>1</sup> *De promisso non solenniter facto loquens*] Id est, non sponsio. Sic epistola xix. distinguit: *Jam non promittunt de te, sed spondent.* Stipulatus et

sponsio, verborum solennitas dicitur Paulo, Lib. v. *Sententiarum*, (Tit. 7. § 1.) et Caio titulo de obligationibus quae ex consensu fiunt. (II. 9. 4.)

<sup>3</sup> Confer PUENDORF. *De Jure Nat. et Gentium*, Lib. III. cap. vi. *J. B.*

3 There may, however, by Natural Law, be other signs of a deliberate purpose, besides the formality of *stipulation*, or anything else which the Civil Law requires as a ground for an action. But what is done not of deliberate intention, we also do not hold to have the force of obligation, as Theophrastus also had noted. And even as to that which is done with deliberate intention, but not with a purpose of conceding a proper right to another, we deny that it gives to any one a right of demanding the performance by Natural Law: though, in this case, we allow that not only a propriety, but even a moral necessity arises.

As to what is adduced from Cicero, we shall treat below, when we have to speak of the interpretation of pacts.

V. But let us see what conditions are required to produce the force of a perfect promise.

1 First there is required the use of reason: and therefore mad-

certo definiri: sed ex quotidianis actibus, aut etiam ex eo quod communiter in quaque regione accidit, desumendum est. Itaque apud Hebreos valebat promissio quam fecisset adolescentis qui annum implesset decimum tertium: puella quae duodecimum. Alibi leges civiles, justa ratione motæ, quasdam promissiones pupillorum ac minorum irritas pronuntiant, non apud Romanos tantum, sed et apud Græcos, ut notatum Dioni Chrysostomo oratione LXXV. adversus quasdam restitutio-

Oret. lxxiv.  
p. 638 d.

nis beneficium introducunt: sed hi effectus sunt proprii legis civilis, ac proinde cum jure naturæ ac gentium nihil habent commune; nisi quod quibus locis obtinent, ibi eas servari etiam naturale est. Quare etiamsi peregrinus cum civi paciscatur, tenebitur illis legibus: quia qui in loco aliquo contrahit, tanquam subditus temporarius legibus loci subjicitur.

3 Plane aliud erit si in mari pactio fiat, aut in vacua insula, aut per litteras inter absentes. Talia enim pacta jure solo naturæ reguntur, ut et pacta eorum qui summam habent

\* Vide infra, cap. 14. hujus Libri,  
§ 2. J. B.

Si lex fundetur in presumptione aliqua facti] Exemplum vide in l. man-

men, and idiots, and children, cannot make a promise. With regard to minors, the case is different; for although these are conceived not to have a sufficiently stable judgment, as also women are not, yet this state is not perpetual, nor is it of itself sufficient to nullify the force of a promise.

2 When a boy begins to have the use of his reason, cannot be defined with certainty: but the inference is to be made from his daily acts, or from that which commonly happens in each country. So among the Hebrews, a promise was valid which was made by a boy after he was thirteen years old, or a girl after twelve. Elsewhere, the Civil Laws, moved by good reasons, pronounce certain promises of wards or minors to be void, not only among the Romans, but also among the Greeks, as Dio Chrysostom notes; and against some such promises, they introduce the benefit of restitution. But these are properly effects of Civil Law, and therefore have nothing to do with Natural Law and *jus gentium*; except that when they obtain, it is agreeable to Natural Law that they be observed.

Hence even if a stranger make an agreement with a citizen, he is bound by the same laws: because he who makes a contract in any place, is under the laws of the place as a temporary subject\*.

3 It is plainly another matter if the compact be made at sea,

\* Lex loci contractus: E. M. 1106.

potestatem, qua tales sunt. Nam in his quæ privatim agunt locum habent leges etiam quæ irritum actum faciunt, ubi id in favorem ipsorum fit, <sup>4</sup>non in poenam.

VI. 1 De pacto errantis perplexa satis tractatio est. Nam distingui solet inter errorem circa substantiam rei, et qui non sit circa substantiam: an dolus causam dederit contractui, an non: fueritne alter, quicum actum est, doli particeps: sitne actus stricti juris an bonæ fidei. Nam pro harum rerum varietate alios actus irritos pronuntiant scriptores, alios <sup>33</sup>validos quidem, sed ut arbitrio ejus, qui læsus est, rescindi possint, aut reformari. Sed harum distinctionum pleræque veniunt ex jure Romano, tum civili vetere, tum prætorio: quædam etiam non satis veræ aut accurate sunt.

2 At viam nobis reperiendæ naturali veritati pandit, quod de legum vi atque efficacia omnium ferme consensu receptum est, ut <sup>5</sup>si lex fundetur in præsumptione aliqua facti, quod factum revera ita se non habeat, tunc ea lex non obliget, quia veritate facti deficiente, deficit totum legis fun-

cipia, 5. C. de *Servis fugitiis*. apud Gai- Linæum ad *Consuet. Paris.* Tit. 1. § 13. Gl. 3. Felin. c. 1. de Conset. n. 40. Bald. in l. Cum quis C. de Jur. et Fact. Ignor. Covar. in c. Posset. de Reg. Jur. in 6. p. 2. § 6. n. 8. et Navar. c. 12. n. 13.

or in a desert island, or by letter between persons absent. For such pacts are governed by Natural Law only; as also the pacts of sovereigns as such. For in the private acts of sovereigns, those laws have place which make the act void, when it is in their favour, not to their detriment.

VI. 1 The discussion of pacts made in error\* is sufficiently perplexed. For a distinction is commonly made between an error as to the substance of a thing, and an error not about the substance: as, whether fraud was the occasion of the contract: whether the person with whom the contract was made was a party to the fraud: whether it be an action *stricti juris* or *bonæ fidei*. For, according to these variations, writers pronounce some acts void, others, valid, but open to be rescinded or remodelled at the choice of him who is injured. But the greater part of these distinctions come from the Roman Law, both the old Civil Law, and the decisions of Prætors; and some of them are not sufficiently true or accurate.

2 But the way to find the natural truth, is opened to us by a principle concerning the force and efficacy of laws, which is received by an almost universal consent:—that if the law be founded on the presumption of some fact, which fact is really not so, then that law does not oblige: because, the truth of the fact failing, the whole founda-

\* Of Erroneous Promises, see E. M. 281.

+ E. M. 717, 718.

Cap. 38.

damentum. Quando autem lex in tali præsumptione sit fundata, ex legis materia, verbis, et circumstantiis colligendum. Similiter ergo dicemus, <sup>b</sup> si promissio fundata sit in præsumptione quadam facti quod non ita se habeat, naturaliter nullam ejus esse vim: quia omnino promissor non consensit in promissum, nisi sub quadam conditione quæ re ipsa non extitit: quo referenda est illa questio apud Ciceronem de *Oratore* primo de eo, qui filium suum mortuum falso credens alium instituerat heredem.

3 Quod si promissor negligens fuit in re exploranda, aut in sensu suo exprimendo, <sup>b</sup> èt damnum inde alter passus sit, tenebitur id resarcire promissor, non ex vi promissionis, sed ex damno per culpam dato, de quo capite infra agemus. Si vero adfuerit quidem error, sed in quo fundata non fuerit promissio, ratus erit actus, utpote non deficiente vero consensu: sed hoc quoque casu si is cui promittitur dolo errori causam dederit, quicquid ex eo errore damni promissor fecit, resarcire tenebitur, ex alio illo obligationis capite. Si

<sup>b</sup> *Si promissio fundata sit in præsumptione quadam facti quod non ita se habeat* Seneca de *Beneficiis* iv. c. 36. *Demens est qui fidem præstat errori.*

<sup>a</sup> *Alia heic est ratio Promissi mere*

*gratuiti, alia Promissi mutui.* In priori, modo bona fide egerit Promissor, ad nihil amplius tenetur. In posteriori, ex circumstantiis judicandum, an ob negligentiā in re exploranda, aut sensu suo

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tion of the law is wanting. But when the law is founded on such a presumption, is to be collected from the matter, words, and circumstances of the law. In like manner then we shall say, that when a promise is founded on the presumption of some fact which is not really so, that by Natural Law it has no force: because the Promiser does not agree to the promise except on a certain condition which in reality did not exist: to which we must refer Cicero's question concerning the person who, falsely believing his son to be dead, made another person his heir.

3 But if the promiser has been negligent in inquiring into the matter, or in expressing his intention, and another person has thereby suffered loss, the promiser will be bound to make that loss good; not by the force of his promise, but as having done damage by his fault; of which head we shall hereafter treat. But if there was indeed an error, but one on which the promise was not founded, the act will be valid, a true consent being there not wanting. But in this case also, if he to whom the promise is made, fraudulently give occasion to the error, he will be bound to make good whatever damage the promiser has done from that error, from that other head of obligation. If the

pro parte fundata erit in errore promissio, valebit pro reliqua parte.

VII. 1 De eo quod metu fit, non minus implicita tractatio est: nam et hic distingui solet inter metum gravem absolute, vel ratione habita personæ metuentis, et levem; illatum juste et injuste; ab eo, cui promittitur, vel ab alio: item inter actus liberales et onerosos: et pro his diversitatibus alii actus dicuntur iritti, alii ad arbitrium promittentis revocabiles, alii in integrum restituendi: non sine magna sententiarum varietate circa hæc singula.

2 Ego omnino illorum accedo sententiæ, qui existimant, <sup>Sylv. Verb.</sup>  
<sup>Met. q. 2.</sup> seposita lege civili, quæ obligationem potest tollere aut minuere, eum qui metu promisit aliquid, <sup>et seqq.</sup> obligari: quia consensus hic adfuit, nec conditionalis, ut modo in errante dicebamus, sed absolutus. Nam ut recte ab Aristotele tra- <sup>Eu. Nic. III.</sup>  
<sup>1.</sup> ditum est, qui naufragii metu res suas jactat, vellet res servare sub conditione, si naufragium non immineret; at absolute vult res perdere, spectata scilicet temporis ac loci circumstantia.

exprimendo, Promissor teneatur. Diximus in Notis Gallicis ad hunc locum. *J. B.*

PUFFENDORFIUM, diximus, *De Jure Nat. et Gent.* Lib. III. cap. 6. § 9. et seqq.  
*J. B.*

\* Minime obligatur. Vide quæ, post

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promise was founded partly in error, it will be valid as to the remaining part.

VII. 1 Of promises made through fear\*, the treatment is no less entangled. For here too a distinction is commonly made between a fear which is grave, either absolutely, or with reference to the person who fears, and a slight fear; between fear impressed justly and unjustly; by the promisee, or by another: also between acts of liberality, and acts of mutual promise. And according to these diversities some acts are declared void; others, revocable at the choice of the promiser; others, cases for entire restitution; not without great variety of opinion on these particular cases.

2 I am entirely of the opinion of those who think that, setting aside the Civil Law, which may either take away or diminish an obligation, he who has promised any thing under fear, is bound †: for here was consent, not conditional, as in the case of erroneous promises, but absolute. For as Aristotle says, he, who in fear of shipwreck,

\* Of Extorted Promises, see *E. M.* 292.

† Obligatur, says Grotius: minime obligatur, says Barbeyrac, and refers to his notes on Puffendorf. See for the reasons why he is bound, *E. M.* 295.

*Sylv. Verb.  
Res. 2. Dict.  
2.  
Navar. c. 17.  
n. 18. et c. 22.  
n. 51. § 7.  
Covar. ad c.  
Pec. p. 2 § 3.  
n. 7.*

Sed illud simul verissimum censeo, si is cui promittitur metum intulerit non justum, sed injustum, quamvis levem, atque inde secuta sit promissio, eum teneri ad liberandum promissorem si promissor velit; non quod inefficax fuerit promissio, sed ob damnum injuria datum, quod quam habeat exceptionem ex jure gentium, <sup>1</sup>infra suo loco explicabitur.

*L. 14. § 3.  
D. quod Met.  
Caus.*

3 Quod vero quidam actus rescinduntur <sup>2</sup>ob metum ab alio incussum, quam quicum actum est, ex lege est civili, quæ saepe etiam actus libere factos ob judicii infirmitatem, aut irritos facit aut revocabiles. Quæ autem de legum civilium vi atque efficacia supra diximus, eadem hic volumus haberri repetita. At quæ ad promissiones firmandas vis sit jurisjurandi, infra videbimus.

VIII. 1 Materiam promissi <sup>3</sup>quod attinet, eam oportet esse, aut esse posse in jure promittentis, ut promissum sit efficax. Quare primum non valent promissa facti per se illiciti: <sup>4</sup>quia ad illa nemo jus habet, nec potest habere. At

<sup>1</sup> *Infra suo loco explicabitur]* Hoc libro, Tit. xvii. § 19. et libro iii. c. xix. § 11.

<sup>2</sup> *Ob metum ab alio incussum]* Se-neca naturam secutus libro iv. controversiarum, controversia xxvii. Ita rescinduntur quæ per vim et necessitatem

*gesta sunt, si vis et necessitas a paciente adhibita est. Nihil enim, inquit, mea, an tu cogaris, si non a me cogeris. Meam culpam oportet esse, ut mea pena fit:* confer quæ infra libro iii. c. xix. § 4.

<sup>3</sup> Confer hac de re PUFENDORFIUM,

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throws his goods overboard, would wish to keep them, conditionally, if there was not the danger of shipwreck; but, absolutely, he is willing to lose them, considering the circumstances of time and place.

But I also think that this is certainly true; that if the promisee has produced a fear, not just, but unjust, even though slight, and if the promise was occasioned by this, he is bound to liberate the promiser if the promiser desires it; not because the promise was invalid, but on account of the damage wrongfully done: what exception to a demand this gives rise to, we shall explain in its own place below.

3 That some of our acts are rescinded on account of fear impressed on us by another person than the one with whom we treat, is a matter of Civil Law, which often also makes either void or revocable acts freely done; on account of infirmity of judgment. And what we have said above, of the force and efficacy of Civil Laws, is to be understood as repeated here.

What is the efficacy of an Oath in making promises hold, we shall see below.

VIII. 1 As to what concerns the *matter* of promises, a condition to produce a perfect promise is, that it is, or may be, in the rightful

promissio, ut supra diximus, vim accipit ex jure promittentis, nec ultra extenditur. Agesilaus de promisso interpellatus respondit: *vai δῆτα, εἰ δὲ ἔστι δίκαιον· εἰ δὲ μὴ, ἐλεξά μὲν, ὥμολόγησα δὲ οὐ· bene, si justum est: sin minus, dixi tantum, non et promisi.* Plut. Apoph. Lac. p. 303 c.

2 Quod si res nunc non sit in potestate promittentis, sed esse aliquando possit, erit in pendentि efficacia; quia tum promissio facta censeri debet sub conditione, si res in potestatem venerit. Quod si conditio, qua res in potestatem promissoris venire possit, ipsa quoque sit potestativa, tenebitur promissor facere quidquid moraliter æquum est ut ea impleatur.

3 Sed in hoc quoque genere lex civilis utilitatis causa multa irrita solet facere, quæ naturaliter obligarent: ut promissum futuri matrimonii factum ab eo eave, qui conjugem nunc habeat, et non pauca quæ a minoribus, aut filiis familiarum fiunt.

*De Jure Nat. et Gent.* Lib. III. cap. 7. J. B.

<sup>8</sup> De validitate et effectibus Promisorum aut pactorum illicitorum fuse et nove egi ad *PUFENDORFIUM, De Jure Nat. et Gentium*, dicto Cap. 7. Lib. III. Not. 2. alterius Editionis. Principiorum

autem ibi positorum usum ostendendi, eaque defendendi, in argumento insigni, de Alea nimirum, occasionem postea habui, duabus Epistolis, quæ reperiuntur in *Ephemeridibus Eruditorum Parisiensibus*, Octobr. 1712. et Decembr. 1713. Edit. Amstelod. J. B.

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disposal of the promiser. Whence, first, promises are not valid, to do an act in itself unlawful; for such a right no one has nor can have. But a promise, as we have said above, receives its force from the right of the promiser, and cannot be extended further. When Agesilaus was interrogated concerning a promise which he had made, he said: *If it be just, well and good: if not, I said, but I did not promise.*

2 If the matter be not now in the power of the promiser, but may at some time be so, the efficacy of the promise will be suspended: because then, the promise must be supposed to be made under the condition, if the thing come into his power. But if the condition under which the thing may come into the power of the promiser, be also *potestativa* [such as he can himself bring about or accelerato], the promiser is bound to do whatever is morally equitable, in order that the condition may be fulfilled.

3 But in such cases also, the Civil Law is wont to make many things void for the sake of utility, which by Natural Law would be obligatory; as a promise of future marriage, made by a man or woman who has a spouse alive; and not a few things done by minors or sons of families.

IX. Quæsti hic solet, an promissio facta ob causam naturaliter vitiosam ipsa natura valeat, ut si quid promittatur homicidii perpetrandi causa. Hic ipsam promissionem vitiosam esse satis appetet: in hoc enim adhibetur, ut alter impellatur ad malum facinus. Sed non quicquid vitiose fit effectu juris caret, quod in prodiga donatione appetet. Hoc interest, quod donatione facta jam cessat vitiositas: nam sine vitio res relinquitur apud donatarium. At in promissis ob causam vitiosam manet vitium, quamdiu non perpetratum est crimen: tamdiu enim impletio ipsa promissi, ut mali illex, labem in se habet, quæ cessare incipit peracto crimine. Unde sequitur usque ad id tempus promissionis talis efficaciam esse in pendenti, ut modo dicebamus in promissa re quæ juris nostri non est: crimine vero perpetrato, jam obligationis vim exseri, quæ ab initio non intrinsecus defuit, sed ab accidente vitio fuit impedita. Ex hujus ref exemplum afferri potest in Juda Gen. xxxviii. Jacobi filio, qui Thamar, quam meretricem putabat, promissam mercedem, <sup>1</sup>Tanquam debitam, persolvit. Quod si iniustitia promissarii causam promissioni dederit, aut inæqua-

Cajet. 2. 2.  
q. 33. art. 7.

<sup>1</sup> *Tanquam debitam*] Natura scilicet,  
secundum cuius legem tunc vivebatur.  
Aliter ex jure civili judicavit C. Aqui-  
lius teste Valerio Maximo, Lib. viii.

c. xi. n. 2.

<sup>m</sup> *De qua mox videbimus*] Cap. xii.  
§ 9, 10, 11.  
<sup>n</sup> Confer PUFENDORFIUM, *De Jure*

IX. It is commonly made a question, whether a promise made for a cause naturally vicious is valid by Natural Law; as if any thing be promised for committing homicide. Here it is evident enough that the promise itself is vicious, for it is made that another person may be induced to commit a crime. But what is done viciously, is not necessarily void, as to its jural effects; as appears by the case of a prodigal donation. There is however this difference; that when the donation is made, the viciousness ceases: for there is no vice in the thing being left in the hands of the donatary. But in promises made for a vicious cause, the vice remains as long as the crime is not perpetrated: so long, the fulfilment of the promise, as a stimulus to evil, has a taint in it which ceases when the crime is committed. Whence it follows, that up to that time, the efficacy of such a promise is suspended, as we said above, in speaking of promising a thing which is not ours to give: but the crime being perpetrated, the force of the obligation comes into play, having been intrinsically in existence from the first, but barred by the vice which was connected with it. We have an example of this in Judah, who paid to Thamar her hire, deeming her a harlot.

litas sit in contractu, hæc quomodo sint resarcienda alia est quæstio, <sup>m</sup>de qua mox videbimus.

X. Quod vero promittitur ob causam ante debitam, non eo minus debetur, si jus naturale spectemus, secundum ea quæ de rei alienæ acceptione supra diximus: nam et sine ulla causa promissum naturaliter deberetur. Sed hic quoque damnum per extorsionem datum, aut inæqualitas in contractu reparanda venient, secundum tradendas inferius leges.

XI. Modum promittendi quod attinet, is, ut de dominii translatione diximus, requirit actum externum, id est signum sufficiens voluntatis, quale interdum esse potest nutus, frequenter autem vox aut literæ.

XII. Sed et per hominem alterum <sup>o</sup>obligamur, si constet de voluntate nostra qua illum elegerimus, <sup>n</sup>ut instrumentum nostrum ad hoc speciatim, aut sub generali notione. Et in generali præpositione accidere potest, ut nos obliget qui præpositus est, agendo contra voluntatem nostram sibi soli significatam: quia hic distincti sunt actus volendi: unus quo nos obligamus ratum habituros quicquid ille in tali negotiorum

*Nat. et Gent. Lib. III. cap. 9. J. B.*

<sup>n</sup> Ut instrumentum nostrum] Servius ad illud *Aeneidos* IX. vers. 361. *Hos-*

*pitio cum jungeret absens, per internun-*

*tios* ait. Vide quæ supra ad caput vi. § 2.

But if the wrong of the promisee gave occasion to the promise, or there be an inequality in the contract, how these things are to be remedied, is another question, hereafter to be considered.

X. What is promised, for a consideration which was due without the promise, is still to be paid, if we look at Natural Law, according to what we have said above of the acceptance of a thing belonging to another. (U. x. 11 and 12.) But here also the damage produced by extortion, or the inequality of the contract, will require to be repaired, according to rules hereafter to be given.

XI. As to what concerns the mode of making the promise, that, as we said of the transfer of ownership, requires an external act; that is, a sufficient sign of the will, which sometimes may be a nod, but more frequently, the voice or writing.

XII. We may also be bound by means of another man, if there be clear evidence of our purpose in appointing him as our instrument either for this special purpose, or in a general manner. And in a general appointment, it may happen that the person appointed binds us, when he acts contrary to our will signified to him alone. For here there are two distinct acts of willing: one by which we obliged ourselves to hold valid whatever he does in this kind of business; another,

genere fecerit, alter, quo illum nobis obligamus ut non agat nisi ex prescripto, sibi non aliis cognito. Quod notandum est "ad ea, quæ Legati promittunt pro Regibus ex vi instrumenti procuratorii, excedendo arcana mandata.

XIII. Atque hinc etiam intelligi potest exercitoriam et institoriam, quæ non tam actiones sunt quam qualitates actionum, ipso naturali jure niti. Adjiciendum hic est male Romanis legibus introductum, ut ex facto magistri exercitores in solidum singuli tenerentur. Nam hoc naturali æquitati convenit, <sup>1</sup>quæ satis habet si pro suis singuli partibus convenientur, nec publice utile est: absterrentur enim homines ab exercendis navibus, si metuant ne ex facto magistri quasi in infinitum teneantur. Atque adeo apud Hollandos, ubi mercatura pridem maxime viguit, et nunc et olim lex illa Romana observata non est: imo contra, constitutum, ne exercitoria etiam universi amplius teneantur, quam ad aestimationem navis, et eorum quæ in navi sunt.

XIV. Ut autem promissio jus transferat, <sup>p</sup>acceptatio hic

<sup>o</sup> Ad ea quæ legati promittunt pro regibus ex vi instrumenti procuratorii excedendo arcana mandata] Vide exemplum apud Marianam xxvii, 19. A liud apud Guicciardinum, Tom. I.

<sup>1</sup> At vero qui cum Magistro navis

contraxit, censetur non cum hoc vel illo Exercitore, sed cum omnibus in universum contraxisse. Rationi etiam ex utilitate publica petitæ, est quod opponi queat, validius forte. Plura diximus in Notis nostris Gallicis. J. B.

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in which we put him under an obligation to us, not to act except according to our directions, known to him and not to others, which is to be noted in those things which Envoys promise for kings in virtue of their written powers, when they go beyond their secret instructions.

XIII. Hence we may understand that an *exercitorian* action (one against ship-owners for the contracts of the captain,) and an *institorian* action, (one against the owner of a trading concern for the contracts of the acting agent,) depend on Natural Law, being, not so much distinct kinds of action, as qualities of actions. But it has been improperly added by the Roman Law, that all the ship-owners are bound severally, as well as jointly, by the acts of the captain. This is neither in accordance with natural equity, which is satisfied if each owner is responsible for his own share; nor useful to the public; for persons are deterred from sending adventures in ships, if they are in fear that they may be indefinitely involved by the acts of the captain. And therefore in Holland, where commerce has long flourished, that Roman law neither prevailed formerly, nor does now; on the contrary, it is the law that, in an *exercitorian* action, even the whole body of owners are not held responsible, beyond the value of the ship and cargo.

non minus quam in dominii translatione requiritur, <sup>2</sup> ita tamen L. qui abs.  
ut hic quoque præcedens rogatio durare intelligatur, ac vim  
habere acceptationis. Nec obstat quod de pollicitationibus factis civitati jure civili est proditum: quæ ratio quosdam 38. prius. D.  
Acq. Post.  
Gom. Tom.  
II. c. 2. n. 1. induxit, ut jure naturæ solum promittentis actum sufficere Molin. Disp.  
263. judicarent: nam lex Romana non hoc dicit, ante acceptationem pollicitationis plenam esse vim; sed revocari vetat, <sup>¶</sup>Vid. hoc L. B.  
cap. iii. § 6.  
et iv. § 10. ut acceptari semper possit: qui effectus non est naturalis, sed mere legitimus: cui non dissimile est quod pro infanticibus et amentibus jus gentium introduxit. Nam pro his, ut possidendi res quæ possessione quæruntur, ita et acceptandi animum jus supplet.

XV. Illud etiam quæri solet, an satis sit acceptationem fieri, an vero etiam innotescere debeat promissori, antequam promissio plenum effectum consequatur. Et certum est utroque modo fieri posse promissionem, aut hoc modo: volo, ut valeat si acceptetur; aut hoc modo: volo, ut valeat si acceptatum intellexero. Et in his quidem quæ ad mutuam pertinet.

<sup>¶</sup> *Acceptatio hic non minus quam in dominii translatione requiritur]* Tertullianus, ut *Jurisperitus*, libro *de Jejunis:* *Votum cum a Deo acceptatum est, legem in posterum fuci.* (Cap. xi.)

PUFENDORF, *de Jure Nat. et Gent.* Lib. III. cap. vi. § 15. *J. B.*

<sup>¶</sup> *Ut acceptari semper possit]* Vide similem legem Wisigothorum, Lib. v. Tit. ii. cap. 6.

<sup>2</sup> *De hoc jure Acceptationis* vide

XIV. In order that a promise may transfer a right, acceptance is required here no less than in the transfer of ownership; but in such a way that here also a precedent asking is understood to remain in force, and to have the effect of acceptance. Nor is this contradicted by what is appointed in the Civil Law, that offers made to the Public are binding; which reason has induced some persons to judge that by the Law of Nature, the act of the promiser alone suffices: for the Roman Law does not say this, that the force of such an offer or *pollicitation* is complete before acceptance; but it forbids it to be recalled, so that it may always be accepted: which effect is not a result of Natural Law, but of Civil Law; very similar to what the *jus gentium* has introduced concerning infants and idiots. For with regard to such persons, both the purpose of taking possession of things which require such a step, and the purpose of acceptance when that is required, are supplied by the law.

XV. The question is also raised, whether it is sufficient that acceptance is made, or whether it must be notified to the promiser before the promise receives its full effect. And it is certain that a promise may be made either way: and also in this way: I desire that

nent obligationem, posterior sensus præsumitur: <sup>3</sup> in promissis vero mere liberalibus potius est ut prior sensus credatur adfuisse, nisi aliud appareat.

*L. 6. C. si  
quicq; alt. vel  
idem. L. 4. D.  
de Man.  
Vind.*

XVI. Sequitur hinc, ante acceptationem, quippe jure nondum translato, revocari promissum posse sine injustitia, imo et sine inconstantia, si revera eo animo factum sit, ut ab acceptatione demum valere incipiat. Revocari etiam posse mortuo ante acceptationem eo cui promissum erat, quia videatur acceptatio in arbitrium ipsius collata, non heredum. Aliud enim est velle dare huic jus ad heredes transiturum, <sup>1</sup> aliud velle dare heredibus: multum enim refert in quem beneficium conferatur. Et hoc est quod Neratius respondit, non videri sibi principem quod ei, quem vivere existimabat, concessisset, defuncto concessisse.

*L. 191. D. de  
Rer. Jur.*

XVII. 1 Poterit etiam revocari mortuo eo qui lectus erat voluntatis internuncius; quia in illius verbis posita fuerat obligatio. Aliud in tabellario, qui non est instrumentum obligationis, sed perlator instrumenti obligatorii. Itaque literæ

<sup>3</sup> Contrarium mihi verius videtur.  
Fuse dicemus, Deo dante, in Notis Gallicis ad hunc locum. *J. B.*

<sup>1</sup> *Aliud est velle dare heredibus]* Ideo ad vitandum ambiguum dici solebat:  
*Illi liberisque ejus.* Servius ad ix.

it be valid, if accepted: or in this manner: I desire that it be valid, if I shall understand that it has been accepted. And in matters which regard mutual obligation, the latter sense is presumed: but in promises merely liberal, the former meaning rather is supposed to prevail, except the contrary appear, [Barbeyrac dissents from this.]

XVI. Hence it follows, that before acceptance, since the right has not yet been transferred, a promise can be recalled without injustice, and even without inconstancy, if it were really made with the intention that it should begin to be valid on acceptance. Also a promise may be revoked, if the promisee die before acceptance: because the acceptance seemed to be referred to the promiser himself, not his heirs. For it is one thing to wish to give a right which will pass to the heirs; another thing to wish to give it to the heirs: for it makes a great difference on whom the benefit is conferred. And this was Nerat's answer, that he did not think that the prince had conceded to a person defunct what he had conceded to him supposing him alive.

XVII. 1 A promise may also be revoked by the death of him who was chosen to declare to the promisee the promiser's will; for the obligation ended in his words. The case is different in a messenger who carries letters merely, and who is not the instrument of

consensus indices per quemvis perferri poterunt. Distinguendum quoque inter ministrum, qui electus est ut promissio-  
nem significet, et inter eum, qui electus est ut ipse promittat. *L. Si Mand.  
15. D. Mandati.*  
Priore casu revocatio vim suam habebit, etiamsi ministro non  
innotuerit: altero vero irrita erit revocatio; quia jus pro-  
mittendi ab ipsis voluntate pendebat, quæ voluntas neandum  
cognita revocatione omni culpa vacabat. Sic etiam priore  
casu <sup>\*</sup>mortuo donatore poterit acceptari donatio, ut perfecta *L. Nec. Amb.  
6. C. de Don.*  
ab una parte, quamquam revocabiliter: quod apertius in lega-  
tis conspicere est: altero casu non poterit, quia non facta est,  
sed mandata fieri.

2 In dubio autem mandantis voluntas fuisse censemur, ut  
impleatur mandatum, nisi magna mutatio inciderit, qualis est  
mors mandantis. Possunt tamen suppetere conjecturæ quæ  
aliud judicandum suadeant, quæ facile admittendæ sunt, ut  
subsistat quod pia de causa dari mandatum est. Ac simili  
modo definiri potest agitata olim controversia, an in here-  
dem mandati detur actio, qua de re aliud M. Drusum præto-

*Aeneidos.* (vers. 302.) Vide et legem *donatio*] Vide librum *de Tenuris Anglia*,  
Wisigothorum Lib. v. tit. xi. c. 6. cap. 7.

\* *Mortuo donatore poterit acceptari*

*Covar. Lib. I.  
Var. c. 14.  
n. 16.  
L. Si Pat. 4.  
D. de Man.  
Vind.*

the obligation, but the carrier of the obligatory instrument; therefore letters indicating consent may be carried by any one. We must distinguish also between a minister who is elected to make known the promise, and him who is elected to make the promise. In the former case, the revocation will have its force, even if it do not become known to the minister: in the other case, the revocation is void, because the right of promising was dependent on the will of the minister or agent, which will, the revocation not being yet known, was free from all fault. So also in the former case, the donation may be accepted, even the donor being dead; as being perfect on one side, although revocably: as may be seen on a large scale in ambassadors: in the other case, the donation cannot be accepted, because it was not really made, but only ordered to be made.

2 But in a doubtful case, the will of the person who gives the order is understood to be, that the order be fulfilled, except some great change take place, as the death of the person ordering. But there may be conjectures which may favour another judgment, which are readily to be admitted, in order that a donation which was directed to be made for a pious cause may subsist. And in like manner may a controversy be decided which was once agitated, whether an action will hold against the heir of a person entrusted with such a charge,

modum tortii adjectum promissioni revocari poterit, quamdiu a tertio acceptatum non erit: quanquam non desunt tam in hac quam in aliis quæstionibus qui secus sentiant. Sed recte rem insipienti facile elucet naturalis æquitas, ut multis probationibus non egeat.

XX. Solet et illud disputari, quomodo convalescere possit promissio cui error causam dedit, si re cognita promissor stare velit promisso. Atque idem quæri potest de promissionibus, quibus lex civilis impedimentum injicit ex metu aut causa alia, si ista causa postea cessaverit. Nam ad hæc firmanda quidam solum actum internum requirunt, quem coniunctum cum priore actu externo sufficere putant ad parientiam obligationem. Alii, quibus id displicet, ideo quia actus externus non potest signum esse actus interni sequentis, requirunt novam verbis factam promissionem et acceptationem. Verior est media sententia, actum quidem externum requiri, sed non utique verbis factum, cum retentio rei promissæ ex parte ejus cui promissa est, et relatio ejus ex parte promittentis, aut simile aliquid, sufficere possint ad significandum consensum.

XXI. Hoc quoque omissendum non est, ne jura civilia

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long as it is not accepted by that third party: although there are not wanting, in this as in other questions, those who think otherwise. But to a person who looks rightly at the matter the natural equity will appear evident, so that it will not need many proofs.

XX. This also is often disputed, how a promise founded in error can recover its force, if the promiser wishes to stand by his promise. And the same question may be asked concerning promises, which are void by the Civil Law on account of fear or other causes, if the cause afterwards have ceased. For to confirm these, they require only an internal act, which, conjoined with the former external act, they think sufficere to produce an obligation. Others, not satisfied with this, because an external act cannot be a sign of a *subsequent* internal act, require a new promise expressed and accepted. The middle opinion is the true one: that an external act is required, but not expressed in words, when the retention of the thing promised by the promisee, and its relinquishment on the part of the promiser, or any similar event, may suffice to signify consent.

XXI. This also is not to be omitted, in order that Civil Law and Natural Law may not be confounded; that promises which have no cause expressed, are not void by Natural Law, any more than donations of property.

*Navar. c. 22.  
n. 51. et 60.  
Lib. iii.*

*Sanc. I. ii. de  
Mut. Disp.  
2. n. 8.*

cum naturali jure confundantur, neque promissiones quæ causam expressam non habent, naturaliter esse irritas, non magis quam rerum donationes.

XXII. Neque eum qui factum alienum promisit ad id quod interest teneri, modo facere non omiserit quod ex sua parte ad id factum obtainendum facere poterat; nisi verba aut negotii natura obligationem inducant strictiorem. *Velut persoluta fide*, inquit Livius, <sup>Covar. c. Quam. p. 2. § 8.</sup> *'quia per eum non stetisset quin præstaretur.* <sup>Lib. II. 32.</sup>

<sup>1</sup> *Quia per eum non stetisset quin præstaretur]* Confer quæ infra Lib. III. c. xxi. § 30.

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XXII. Also that he who has promised an act on the part of another, is not bound to the extent of the interest of the promisee, provided he has not omitted to do what he could on his own part, to obtain the doing of the thing promised; except there be words, or the nature of the business, such as to induce a stricter obligation. *As if he had performed his engagement*, says Livy, *because it did not depend on him that it was not performed.*

CAPUT XII.  
DE CONTRACTIBUS.

- I. *Divisio actuum humanorum qui aliis hominibus utiles sunt: ac primum in simplices ac mixtos.*
- II. *Simplicium, in beneficos meros, aut cum mutua obligatione:*
- III. *Et permutatorios: tum qui dirimunt,*
- IV. *Tum qui communionem adferunt,*
- V. *Mixtos esse principaliter,*
- VI. *Aut per accessionem.*
- VII. *Qui actuum contractus dicantur.*
- VIII. *Aequalitatem in contractibus requiri: Primum, circa actus procedaneos.*
- IX. *Ad scientiam:*
- X. *Ad libertatem volendi.*
- XI. *Secundo, in ipso actu, si sit permutatorius.*
- XII. *Tertio, in eo, de quo agitur: quod explicatur.*
- XIII. *Quae aequalitas locum habeat in actibus mere aut partim beneficis.*
- XIV. *Quomodo aestimandum rei pretium in venditione: et ex quibus causis juste crescat aut minuatur.*
- XV. *Quando naturaliter per-*
- I. **A** CTUUM humanorum, qui ad aliorum hominum utilitatem tendunt, ali sunt simplices, ali compositi.
- II. \* Simplices alii benefici, ali permutatorii. Benefici

\* *Simplices alii benefici, ali permutatorii]* Aristoteles illa omnia δόσεως, haec πρόσως nomine comprehendit.  
[Locus est Rhetor. Lib. I. c. 5. p. 523 a.]

CHAPTER XII. *Of Contracts.*

- I. Of human acts which tend to the utility of others, some are simple, some are compound.

aut meri, aut cum mutua quadam obligatione. Benefici meri, aut in præsens absolvuntur, aut in futurum prominent. In præsens absolvitur factum utile, do quo nihil loqui necesse est, quando utilitatem quidem parit, sed nullum juris effectum : item donatio, qua dominium transfertur, qua de re egimus supra cum de dominii acquisitionibus ageretur. In futurum prominent promissiones tum dandi, tum faciendi, de quibus jamjam egimus. Benefici actus cum obligatione mutua sunt, qui aut de re disponunt sine alienatione, aut de facto ita ut aliquis effectus supersit. Talis est circa rem usus concessio, qui commodatio dicitur : in factis præstatio operæ sumtuosæ, aut obligatoriæ, quæ dicitur mandatum, cuius species est depositum, præstatio scilicet operæ in re custodienda. His autem actibus similes sunt actuum promissiones, nisi quod, ut diximus, hæ in futurum prominent : quod et de actibus jam explicandis intellectum volumus.

III. 1 Actus permutatorii aut dirimunt partes, aut communionem adferunt. Actus eos qui diremtorii sunt, recte di-

Tom. II. Edit. Paris. Sed agitur ibi autem de omnibus Contractibus. J.B.]  
de Alienatione, Ἀπαλλοτρίωσις, non

II. Of simple acts, some are gratuitously *beneficial*, others are of the nature of exchange of one act for another, *permutatorial*. Beneficial acts are either merely so, or with some mutual obligation. Mere beneficial acts are either discharged in the present time, or stand over for the future. A useful good office is performed in the present time, and of this it is not necessary to speak, since it produces advantage indeed by the recipient, but no effect as of right: so also a donation, by which ownership is transferred, of which we treated above, when we spoke of acquisitions of ownership. As acts standing over for the futuro, we reckon promises both of giving and of doing; concerning which we have already spoken.

Beneficial acts with a mutual obligation, are those which dispose of any thing without alienation, or so dispose of an act that some effect survives. Such is a concession of the use of a thing, which is called a Loan; and of acts, the undertaking of an office expensive or obligatory, which we may call a Commission; of which kind is a Deposit, namely, the office of keeping a thing in custody. Similar to these acts are the promises of acts, except that, as we have said, these stand over for the future; which also we desire to have understood of the acts now to be explained.

III. 1 Permutatorial acts either separate the parties or produce a community between them. Those acts which separate, *dirematorial*

vidunt jurisconsulti Romani in do ut des, facio ut facias, facio ut des: de quibus videri potest Paulus jurisconsultus in I. Leg. 5. princ. *Naturalis*: Digestis, *Præscriptis verbis*.

2 Sed Romani ab hac divisione eximunt quosdam contractus, quos ipsi nominatos vocant, non tam quod proprium habeant nomen (habet enim hoc et permutatio, quam a nominatorum numero excludunt) quam quod ob usum frequentiorem <sup>b</sup> vim quamdam et naturam accepissent talem, quæ etiamsi nihil esset dictum specialiter, ex ipso nomine satis posset intelligi: undo etiam certæ de illis proditæ erant actionum formulæ: cum in cæteris contractibus minus frequentibus hoc tantum inesset, quod dictum erat, ac proinde non communis aliqua et usitata, sed accommodata ad ipsum factum daretur formula, quæ ideo præscriptis verbis dicebatur. Ob eandem causam usus frequentioris in conventionibus nominatis, si requi-

<sup>b</sup> *Vim quandam et naturam accepissent talem*] Vide Vasq. Lib. i. controv. c. x. in fine.

<sup>c</sup> *Si de pretio convenissemus*] Apud Hebreos perfecta non censemur venditio, ante traditionem veram vel imaginariam. [Vide SELDEN. *De Jure Nat. et Gent. Secund. discip. Hebr.* Lib. vi. c. 5.]

<sup>d</sup> *Simplicior est et antiquior*] Apparet id ex Homeri versibus productis Lib. i. D. *de Contrahenda Emtione*. Ta-

citus de Germania, (Germ. c. 5): *Interiores simplicius et antiquius permutatione mercium utuntur*. Servius, ad Eclogam iv. ad illud (vers. 39): *Mutabant merces: quia antiqui res rebus mutabant*. Et ad illud Georg. iii. (vers. 307): *Vellera mutentur: ingenti pretio comparentur*. Nam apud majores omne mercimonium permutatione constabat, quod et Caius Homericus confirmavit exemplo. Plinius, libro xxxiii. c. 1:

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acts, the Roman jurists rightly divide into these: *do ut des: facio ut facias: facio ut des*. See Paulus and the Digests. [Dig. xix. 5.]

2 But the Romans except from this division certain contracts which they call *nominate contracts*\*; not so much because they have proper names, (for *permutation* or *exchange*, which they exclude from nominate contracts, has also a proper name,) as because, from their more frequent use, they have received a certain force and nature, which may be sufficiently understood by the name, although nothing be said specially. Whence also with regard to them there were certain established formulæ of actions. While in other contracts, which are less frequent, that only was implied which was expressed; and therefore there was not any common and usual form of action, but a form accommodated to the fact, which was therefore called a form *in praescript words*.

For the same reason, of a more frequent uso in the nominate contracts, if certain requisites were present, the necessity of fulfilling

\* See E. M. 708, &c.

sita quædam adessent, ut in venditione <sup>c</sup> si de pretio convenisset, etiam re *integra*, id est antequam a partium altera præstitum esset aliquid, injungebatur implendi necessitas: cum in illis rarioribus re *integra* daretur pœnitendi libertas, id est impunitas, quia lex civilis vim coactricem subtrahebat illis conventionibus, ut sola contrahentium fide starent.

3 At jus naturæ ignorat hæc discrimina: neque vero qui innominati ab illis dicuntur contractus, aut minus sunt naturales, aut minus antiqui: imo permutatio, quæ innominatis accensetur, emtione et <sup>d</sup> simplicior est et antiquior. Et Eustathius ad Iliados x. ubi de certamine publico agitur, cui præ- v. 100. *μέρισθαι*, *μεταλλάττεσθαι*, addens *συνάλλαγμα γάρ τι καὶ τὰ τοιαῦτα* nimirum facio ut des. Nos ergo naturam sequentes, contractus omnes diremtorios, nullo nomi-

*Quantum feliciore ævo, cum res ipsa permutabantur inter se, sicut et Trojanis temporibus factitum Homero credi convenit. Libro sexto, cap. xxii. de Seribus: Fluminis ulteriore ripa merces propositas iuxta renalia tolli ab his si placeat permutatio. Mela de iisdem (Lib. III. c. 7. n.10. Ed. Voss.): Seres intersunt, genus plenum justitiae ex commercio, quod rebus in solitudine relictis absens peragit. De iisdem Ammianus,*

libro xxxiii. (Cap. vi. p. 413. Ed. Vales. Gron.): *Cum ad coemenda fila vel quædam alia fluvium transierunt advene, nulla sermonum rice, propositarum rerum pretia solis oculis estimantur. Mela de Sarmatis, [Immo de Satarchis, II. I. 95]: Vice rerum commercia exercent. De Colchis vide Busbequium Epistola Exoticarum III. (Pag. 205. Ed. Elzev. 1660.) de Lapponibus, Olauum Magnum, libro iv. c. 5.*

the contract was held as the rule; as in *sale* if the price had been agreed upon, the contract was good, even *re integræ*, that is, though nothing had been performed on either side: while in the rarer contracts, *re integræ*, there was allowed the liberty of retracting, that is, impunity, because the Civil Law withheld coactive force from those contracts, leaving them to stand on the good faith of the contracting parties only.

3 Natural Law does not recognize these distinctions: for the contracts which are called by men *innominate*, are neither less natural nor less ancient than the nominate. Nay Exchange, which is reckoned among the innominate, is both older and simpler than buying. Eustathius, where in the *Iliad* (B. x.) a public contest is mentioned with a prize appointed, which in Homer is said to be *earned*, interprets it, *taken in exchange*, adding, *for it is a sort of contract*; namely, *socio ut des*, I work that you may pay. We therefore, following nature, shall refer all diremtry contracts to the three kinds which we have mentioned, making no distinction of nominate and innominate.

natorum aut innominatorum discriminē, ad tria quæ diximus genera revocabimus.

Arist. *Eth.* v.  
8. 1. *Pol.* 9.  
*D. de Cont.*  
*Emt.* 1. 1.

4 Dicemus proinde dari ut detur, statim quidem rem pro re, ut in ea, quæ specialiter dicitur permutatio, antiquissimum haud dubie commercii genus: aut <sup>e</sup>pecuniam pro pecunia, quod collybum Græci vocant, mercatores hodie cambium: aut rem pro pecunia, ut in emptione ac venditione: aut usum rei pro re: aut usum rei pro usu rei: aut usum rei pro pecunia, quod postremum locatio conductio dicitur. Usus autem nomine hic intelligimus tum nudum usum, tum eum qui cum fructu conjunctus est, sive is sit temporarius, sive personalis, sive hereditarius, sive alio quovis modo circumscriptus, ut apud Hebræos is qui durabat ad annum Jubilæum. Datur vero, ut interposito tempore tantundem, et genere idem detur, in mutuo, quod locum habet in his, quæ pondere, numero, mensura constant, tam rebus aliis, quam pecunia.

5 Facti cum facto permutatio innumerās habere potest species pro factorum diversitate. At facio ut des, aut pecuniam; (atque id quoque in factis quotidianæ utilitatis locatio conductio dicitur, in facto præstandæ indemnitatis circa casus

e Pecuniam pro pecunia] De eo vide Procopium *Arcana Historia.* (cap. 26).  
Nummus Illyrico advectus quondam in Italia mercis loco. Plinius libro xxxiii.  
c. 3.

<sup>1</sup> Verius est, heic esse meram Em-

4 Hence we shall say that *do ut des*, *I give that you may give*, either one thing for another, which is specially called Permutation or Exchange, and is doubtless the oldest kind of commerce: or money for money, to which the merchants give the technical name of *Exchange*: (*Cambium*;) or a thing for money, as in Buying and Selling: or the use of a thing for another; or the use of a thing for the use of a thing: or the use of a thing for money, which is Letting and Hiring. By *use*, we here mean both the naked use, and that which is combined with the enjoyment of the produce, whether temporary, or personal, or hereditary, or circumscribed in any other way; as that which among the Hebrews continued to the year of the Jubilee. In a Loan, the thing is given, in order that after the lapse of a certain time, the same in quantity and kind may be returned, of things which are estimated in weight, measure, and number, both other things and money.

5 The exchange of act for act may have innumerable kinds according to the diversity of the acts. But *facio ut des*, is, *I act that you may give*, either money, (and this includes Letting and Hiring, and Assurance against risk, a contract formerly hardly

fortuitos aversio periculi, vulgo assecuratio, qui contractus olim vix cognitus nunc est inter receptissimos;) aut ut des rem, aut usum rei.

IV. Actus autem communicatorii aut facta communicant, aut res, aut hinc res, inde facta ad utilitatem communem, quæ omnia veniunt societatis nomine: in quo genere comprehenditur et bellica societas, qualis illa apud nos frequens navium privatuarum coitio adversus piratas, aut alios invasores, quam vulgo Admiralitatem nuncupant, Græci *σύμπλοιαν* aut *ομόπλοιαν* vocabant.

V. Mixti autem actus sunt, aut principaliter, aut per accessionem alterius. Sic si sciens rem majoris emam, et quod plus est in pretio alteri condonem, partim donatio erit, partim emtio: si fabro pecuniam promittam, ut de suo auro mihi annulos faciat, partim emtio erit, partim conductio. Sic et in societate accidit, ut alter factum et pecuniam, alter pecuniam tantum contribuat. Et in feudal contractu rei feudalis concessio beneficium est, pactio autem militaris operæ pro tutela, est facio ut facias. Quod si onus pensionis accedat, eatenus miscetur cum emphyteusi. Fœnus quoque nauticum mixtum quid est ex contractu mutui, et periculi aversi.

tionem venditionem: quæ sententia tan-      § 4. Inst. De Locat. Conduct. J. B.  
dem prævaluuit apud JCtos veteres. Vide

known, now among the most common,) or that you may give a thing, or the use of a thing.

IV. Acts communicatory, either establish a community of acts, or of property, or property on the one side, acts on the other for the common utility; all which are called Partnership. In which class are included associations for the mutual Protection of ships in time of war, against pirates or other enemies, which is called *an Admiralty*.

V. Acts are mixed (or compound, § 1) either as principal, or by the accession of another act. [First as principal.] Thus if I knowingly buy a thing for more than it is worth, and give the seller the excess of price, it is partly buying, partly donation. If I promise money to a goldsmith for making rings for me of his own gold, it is partly buying (of material), partly hire (of labour). So in Partnerships it happens that one person contributes acts and money, another money only. And in the Feudal Contract, the concession of the fief is a benefice, but the pact of military service for protection is *facio ut facias*. And if the fief be burthened with an annual pay-

VI. Per accessionem ad alterum actum fit mixtio, ut in fidejussione et pignoris datione. <sup>2</sup>Nam fidejussio, si negotium spectes quod inter fidejussorem et principalem debitorem geritur, plerumque mandatum est: sin negotium quod inter creditorem et fidejussorem, qui nihil recipit, geritur, videtur actus mere liberalis: sed quia contractibus onerosis accedit, inde censeri solet. Pignoris quoque datio per se videtur actus liberalis, qua detentio rei conceditur: sed hæc quoque naturam trahit ex contractu, cui securitatem præstat.

VII. Omnes autem actus aliis utiles, extra mere beneficos, contractuum nomine appellantur.

VIII. In contractibus natura æqualitatem imperat, et ita quidem, ut ex inæqualitate jus oriatur minus habenti. <sup>3</sup>Hæc æqualitas partim consistit in actibus, partim in eo de quo agitur, et in actibus, tum præcedaneis, tum principalibus.

IX. 1 Ad præcedaneos actus pertinet, quod is qui cum aliquo contrahit <sup>4</sup>vitia sibi nota rei de qua agitur significare debet: quod non civilibus tantum legibus constitui solet, sed naturæ quoque actus congruit. Nam inter contrahentes pro-

L. 1. D. de  
Act. Emt. et  
Vend.

<sup>2</sup> Nulla est heic vera mixtio actuum.  
Vide PUFENDORF. *De Jure Nat. et Gent.*  
Lib. v. cap. 2. § 10. *J. B.*

<sup>3</sup> Confer, in toto isto argumento,  
eundem PUFENDORF. Lib. v. cap. 3.

*J. B.*

<sup>4</sup> *Vitia sibi nota*] Vide Scholiasten  
ad illud Horatii (11. Sat. III. 285):

mentem nisi litigiosus  
Exciperet dominus.

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ment, it is, so far, a letting for a money-rent. So money lent to shipowners is partly a Loan and partly Insurance.

VI. Acts are mixed by the accession of another act, as in giving security, and in pledge. For suretship, if you regard the business which takes place between the surety-giver and the principal debtor, is for the most part a commission: if you regard the business between the creditor and the surety-giver, who receives nothing, it is an act merely liberal: but because this liberal act is added to an onerous contract, it is reckoned with such contracts. So the giving of a pledge seems to be a liberal act, by which the detention of a thing is conceded; but this also takes its nature from the contract which is thus supplied with a security.

VII. All acts useful to others, with the exception of merely beneficial acts, are called Contracts.

VIII. In Contracts, nature requires equality, and in such a way that, from inequality, he who has the worse share, acquires a right. This equality consists partly in the act, partly in the matter concerning which the act is, and in the acts both precedent and principal.

IX. 1 It belongs to the preceding acts, that he who makes a

pior quædam est societas quam quæ communis est hominum. Atque hoc modo solvitur quod dicebat Diogenes Babylonius Cic. de Offic. iii. 12. hoc tractans argumentum, non celari omnia quæ tacentur: nec quidquid tibi audire utile est idem mihi dicere necesse esse, ut de rebus celestibus, nam <sup>5</sup>contractus natura utilitatis causa reperta proprius quiddam exigit. Bene Ambrosius: *In contractibus etiam vitia eorum quæ veneunt prodi jubentur, ac nisi intimaverit venditor, quamvis in jus emtoris transcriperit, doli actione vacuantur.* Lactantius dixerat: *Qui vendentis errorem non redarguit, ut aurum parvo emat, aut qui non profitetur fugitivum servum, vel pestilentem se domum vendere, lucro et commodo suo consulens, non est ille sapiens, ut Carneades videri volebat, sed callidus et astutus.*

2 At non idem dicendum est de his quæ rem non continent: ut si quis sciat multas naves in cursu esse quæ frumentum advehunt: nam tale quid indicare est quidem officiosum ac laudabile, saepe adco ut omitti nequeat, nisi caritatis regula violetur; non tamen injustum, id est, non pugnans cum jure ejus, quicum negotium est: ita ut locum hic habere possit

5 Contractus natura utilitatis causa reperta proprius quiddam exigit] Valerius Maximus Lib. viii. c. ii. n. 1. bona fidei venditorem, nec commodorum spem

augere, nec incommodorum cognitionem obscurare oportet. Agitur ibi de ædibus diruijussia ab auguribus, quod emtorem venditor celaverat.

Thom. 2. 2.  
77. art. 3.  
Bal. ad l. 1.  
de Adil. ed.  
Covar. ad c.  
Pec. p. 2. § 4.  
n. 6. d. loco.

contract about any thing, ought to make known the faults of the thing so far as he knows them, which is not only the usual rule of Civil Laws, but also agreeable to the nature of the act. For between the contracting parties, there is a connexion closer than the common society of mankind. And in this way we answer the argument of Diogenes of Babylon on this subject, who says that all that is untold is not therefore concealed: and that it is not necessary for me to say all that it is useful for you to hear: thus I need not tell you how the heavens move. For the nature of Contract, having for its object common utility, requires some closer union. So Ambrose and Lactantius. [Sec.]

2 The same does not apply to circumstances which do not affect the thing itself: as if any one know that there are many ships on their way bringing corn. To tell this is kind and laudable; often so far, that it cannot be omitted without violating the rule of charity: but the omission is not unjust; that is, it is not repugnant to the right of him with whom I deal: so that here that may hold which the same Diogenes said, as Cicero reports\*, *I bring my wares to market: I offer*

\* See E. M. 716.

*illud, quod idem ille Diogenes non incommodate dicebat, referente M. Tullio: Ad vixi, exposui: vendo meum, non pluris quam ceteri: fortasse etiam minoris cum major est copia: Cap. 13. vid. cui fit injuria?* Non ergo generaliter sequendum illud ejusdem Ciceronis, celare esse, cum tu quod scias, id ignorare emolumenti tui causa velis eos quorum intersit scire: sed tum demum id locum habet, cum de iis agitur quæ rem subjectam per se contingunt, ut si domus sit pestilens, si a magistratu dejici jussa, quæ exempla ibidem videas.

*3 At vitia ei quicum agas nota, ut servitutem ædium quas M. Marius Gratidianus C. Sergio Oratæ vendebat ab ipso D. I. 1. D. de prius emtas, dici nihil attinet: <sup>Act. Em. et Vend. in fin.</sup> <sup>b</sup>scientia enim utrinque par pares facit contrahentes. Horatius (II. Epist. II. 13):*

Ille feret premium poenæ securus, opinor:  
Prudens emisti vitiosum.

*p. 916. Tom. II. Quod notatum et Platoni undecimo de Legibus.*

X. Neque vero tantum in intellectu rerum, sed et in voluntatis usu quædam contrahentibus inter se æqualitas debetur: non quidem ut si quis antecessit metus juste incussus, is demi debeat; id enim contractui extrinsecum est: sed nequis

<sup>b</sup> *Scientia utrinque par, pares facit contrahentes]* Edictum Theuderici, c. 141.

<sup>4</sup> Addidi vocem *injuste*, quæ in om-

nibus Edd. manifesto deest, ut patet ex serie orationis, et oppositione *roū metus juste incussus*. Vocabulum, ob similitudinem sequentis *incutiat*, a Typogra-

*them for sale: I sell what is my own: not dearer than others; perhaps cheaper, as I have a larger stock. Whom do I wrong? Therefore we are not in general to follow the rule which Cicero lays down, that it is concealment, if those whose interest it is to know anything, you would have ignorant of it for the sake of your gain. That holds with regard only to points which affect the thing itself: as if a house which is to be sold is unhealthy; if it has been ordered by the magistrate to be pulled down: where see the examples which he gives.*

3 The faults which are known to the person with whom you deal, need not be mentioned; as the *servitude* to which the house was subject which Gratidianus sold to Oratas, having bought it of him before: for both parties, having equal knowledge, are on an equality. So Horace; Plato.

X. Nor is it only in the understanding with respect to the matter, but also in the use of the will, that there ought to be a certain equality between the contracting parties: not indeed that if there have gone before any fear justly impressed, that must be removed, for that is extrinsic to the contract: but that no fear is to be un-

injuste *incutiatum contrahendi causa, aut si incussus est, ut dematur.* Hoc spectantes Lacedæmonii resciderunt emtionem agri, quam Elei possessoribus metu expresserant, γνόντες μηδὲν δικαιότερον εἶναι, βίᾳ πριαμένους ή βίᾳ ἀφελομένους, παρὰ τῶν ηττόνων λαμβάνειν Arbitrati nihil justius esse, infirmioribus per emtionis titulum, quam vi mera rem extorquere, quæ Xenophontis verba sunt. Quod tamen quam exceptionem ex jure gentium habeat, suo loco videbimus.

*Hist. Gr. iii.  
2. § 22.*

XI. 1 In ipso actu principali haec desideratur æqualitas, ne plus exigatur quam par est. Quod in contractibus beneficis locum vix potest habere. Nam si quis pro commodato, aut opera in mandato aut deposito exhibenda, aliquid mercedulæ stipuletur, non injuriam faciet, sed contractum miscebit, id est ex gratuito efficiet semipermutatorium. At in permutteriis omnibus sollicite id observandum est: nec est quod dicat quispam, id quod pars altera amplius promittit, donatum censeri. Neque enim solet hic esse tales contractus ineuntium animus, nec præsumendus est nisi appareat. Quod enim promittunt aut dant, credendi sunt promittere aut dare tanquam æquale ei quod accepturi sunt, utque ejus æqualitatis ratione debitum.

*Inst. de  
Mand. § ult.  
L. 1. § Si  
quis Serv. q.  
D. Depos.*

phis omissum, non animadvertisit Auctor ipse; unde nil mirum si fugerit Editores. Contrarium τὸ justæ alibi omis-

sum, simili incuria, videbimus, cap. xx.  
hujus Libri, § 40. sub finem. J. B.

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justly impressed with a view to the contract; or if it be impressed, that it be put away. Looking at this rule, the Lacedæmonians rescinded the purchase of the land which the Thebans had extorted from the possessors by fear. See Xenophon. What exception there is to this in the Law of Nations, we shall see in its own place.

XI. 1 In the principal act of a contract this equality is required, that more be not demanded than is equitable. Which, in beneficial contracts, can hardly have place. For if any one demands some payment for a loan, or for executing a commission, or keeping a deposit, he does no wrong, but he alters the nature of the contract, and makes it, from being gratuitous, become semipermutatory. But in all permutatory contracts this is carefully to be observed. Nor is it enough for any one to say that what the other party has promised more than equality, is to be regarded as a donation. For such is not the intention of contracting parties, and is not to be presumed so, except it appear. For what they promise or give, they are to be supposed to promise or give as equivalent to what they are to receive, and as what is done on the ground of such equivalence.

In Joann.  
Hom. ix.  
Tom. ii. p.  
809.

p. 1043.

**2 Joh. Chrysostomus:** ὅταν γὰρ ἐν τοῖς συμβολαίοις καὶ ηὑίκα δὲ ἀγοράσαι δέη τι ἡ καὶ ἀποδόσθαι, φίλονεικῶμεν καὶ βιᾳώμεθα ἔλαττον τῆς ἀξίας καταλαβεῖν καὶ πάντα ὑπέρ τούτου ποιῶμεν, οὐ ληστεία τὸ πρᾶγμα ἔστιν. Quoties enim in contractibus, et quoties emendum quid aut dependendum est, contendimus, omnique modo laboramus ut minus aequo pretio demus; <sup>5</sup> nonne huic facto quoddam inest furtum? Scriptor vitae Isidori apud Photium, Hermiam narrat, ubi quod emere vellet justo forte minoris esset indicatum, adjeclisse quod justo pretio deerat, quod existimaret aliter agere injustitiæ esse speciem, sed talis quæ plurimos lateret. Et in hunc sensum interpretantur Hebrei legem, quæ est <sup>i</sup>Levit. xxv. 14 et 17.

**XII. 1** Restat æqualitas in eo de quo agitur, in hoc consistens, ut etiamsi nec celatum quicquam sit quod dictum oportuit, nec plus exactum quam deberi putabatur, si in re tamen deprehendatur inæqualitas, quamquam sine culpa partium, puta quod vitium latebat, aut de pretio errabatur, ea quoque sit resarcienda, et demendum ei qui plus habet, redendumque minus habenti: quia in contractu id utrimque propositum aut fuit, aut esse debuit, ut uterque tantundem haberent.

<sup>5</sup> Sententiam istam, ut nimis rigida, improbat, simulque ab Auctore nostro male ληστείαν verti furtum, quæ vox significat latrocinium, adeoque du-

rior, obiter observavit v. Cl. ANT. SCHULTINGIUS, Sermon. Academic. De angusta innocentia Hominis ad Legem boni, pag. 38.

## 2 Authorities of Chrysostom, Hermias, Levit. xxv. 14 and 17.

**XII. 1** There remains to be considered, equality in the thing itself, consisting in this, that though nothing was concealed which ought to have been told, nor more exacted than was thought to be due; yet if there be an inequality in the thing itself, though without any fault of the parties; if for instance there was some latent defect, or some error about the price, that also is to be made good, and the difference paid to him who suffers by it; because, in a contract, there was intended, or ought to have been, that each party should have the same value.

**2** The Roman law appointed this as the rule, not in every inequality, (for the law does not follow matters to their smallest dimensions, and also wishes to obviate the multitude of lawsuits,) but in a grave inequality, as for instance, one which exceeds the half of the fair price. In fact, laws, as Cicero says, remove what is not equitable, in cases when you can take hold of it with your hand; the philosophers, so

2 Lex Romana hoc constituit non in quavis inæqualitate, minima enim non persequitur, imo et occurrentum censet multitudini litium, sed in satis gravi, ut quæ dimidium justi pretii excedit. Nimirum leges, ut ait Cicero, iniqua tollunt quatenus teneri manu possunt, philosophi quatenus ratione et intelligentia. Hi vero qui legibus civilibus subjecti non sunt, id sequi debent quod æquum esse ipsis ratio recta dictat: imo et illi qui legibus subjecti sunt, quoties de eo quod fas piumque est agitur, si modo leges non jus dant aut tollunt, sed juri duntaxat ob certas causas auxilium suum denegant.

XIII. 1 Sed notandum est, quandam rei æqualitatem spectari et in contractibus beneficis, non quidem omnimodam ut in commutatoriis, sed ex suppositione ejus quod agitur, ne quis scilicet ex beneficio damnum sentiat: ob quam rationem mandatarius indemnus præstari debet a sumtibus factis, et damno in quod ex causa rei mandatæ incidit: et commoda- Sylvest. in  
Verb. Bell.  
p. i. n. 7.  
Thom. 2. 2.  
61. art. 6.  
tarius rem tenetur resarcire si periit, quia non solius rei ra-  
tione domino tenetur, id est, ex vi dominii, quomodo quivis possessor teneretur, ut supra didicimus, sed et ratione beneficæ acceptanceis: <sup>k</sup>quod ita verum est, nisi omnino et apud dominum fuisset peritura. Hoc enim casu nihil per commodatum domino abest. Contra depositarius præter fidelitatem nihil

<sup>1</sup> Levitici xxv. 14, 17.] Vide Mosem apud dominum fuisset periturum] Lex de Kotzi, precepto jubente LXXXII. Wisigothorum Lib v. tit. v. c. 1, 2, 3.

<sup>k</sup> Quod ita verum est, nisi omnino et

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far as you can grasp it by reason and intelligence. But those who are not subject to Civil Laws ought to follow that which right reason dictates to them as equitable; and even those who are subject to laws, whenever the question is what is right and pious; since the laws do not create or destroy right, but only deny their support to some rights for certain causes.

XIII. 1 It is to be noted that a certain equality of matter is to be regarded even in beneficial contracts; not a complete equality, as in commutatorial, but one according to the nature of the transaction: so that a person may not be damaged by a benefit which he bestows: for which reason a commissioner or agent is to be indemnified for the expense and loss which he incurs by his agency: and a *loanees* is bound to make good the thing lent if it be destroyed; because he is bound to the owner, not in respect to the thing alone, that is, by virtue of ownership, as any possessor of it would be bound, (as above said,) but also in virtue of the benefit received: which holds true, except the thing would have perished also, if it had remained with

recepit: ideo si periit res, non tenebitur: non rei ratione, quia non exstat, nec locupletior est; nec acceptio ratione, quia accipiendo beneficium non accepit, sed dedit. In pignore, ut et in locato, media via sequenda est, ut qui rem accepit nec de casu quovis teneatur ut commodatarius, et majorem tamen diligentiam quam depositarius praestare debeat: quia pignoris acceptio est quidem gratuita, sed accedere solet contractui oneroso.

2 Quæ omnia Romanis quidem congruunt legibus, sed non ex illis primitus, sed ex æquitate naturali veniunt. Quare eadem apud alias quoque gentes reperire est. Inter ceteros apud Hebreum Mosem Maimonidem libro III. ductoris dubi-  
vii. de Benef. 19. tantum <sup>1</sup>cap. 43. Spectavit huc Seneca cum dixit, *alios fidem debere, alios tutelam.* Ad hanc vero formam de cæteris quoque contractibus judicium est faciendum. Sed generali tractatione quantum instituto nostro sufficit absoluta, speciales quasdam contractuum quæstiones percurramus.

<sup>1</sup> Capite 43] Convenit cum Exodi loco cap. xxii. 7, 10, 11, 12, 13. Moses de Kotzi præceptis jubentibus LXXXVIII. et LXXXIX.

<sup>o</sup> Vide de iis omnibus, quæ ad pretiū naturam et varia genera pertinent, PUFENDORFIUM *De Jure Nat. et Gent.* Lib. v. cap. i. cum Notis nostris, alterius Editionis. J. B.

<sup>m</sup> *Pretia luxuria fecit*] Idem libro XXXVII. de Gemmis (c. 6): *Singulorum libido singulis modum facit et maxime regum.* Et libro XXXII. *Quantum apud nos Indicis margaritis pretium est, tantum apud Indos in coralio: namque ista persuasione gentium constant* (c. 2). AUGUSTINUS *de Civitate Dei* libro XI. cap. 16. *Sed quid mirum, cum in ipseorum*

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the owner. For in this case, the owner loses nothing by the loan. On the other hand, a depositary receives nothing but a reliance on his good faith: therefore if the thing perish he is not bound; not by reason of the thing, for it no longer exists, and he is no better off for it; nor by reason of his having accepted it, for by accepting it, he bestowed, not received, a benefit. In a pledge, and in a thing hired, a middle way is to be followed: so that he who has accepted the thing is not bound to make it good like a loanee, and yet is bound to use more diligence than a depositary: because the acceptance of a pledge is gratuitous indeed, but is usually an accompaniment of an onerous contract.

2 All which rules agree indeed with the Roman Laws, but appear not to come originally from them, but from natural equity. And hence the same rules are to be found also among other nations. So Maimonides, Seneca. And according to these principles we must judge also of other contracts. But having finished the general discussion so far as our purpose requires it, let us run over certain special questions of contracts.

XIV. 1 Mensura ejus <sup>6</sup>quod res quæque valeat maxime naturalis est indigentia, ut Aristoteles recte ostendit: quod in permutationibus rerum apud barbaros populos maxime spectatur. Non tamen hæc unica est mensura. Nam hominum voluntas, quæ rerum domina est, multas res magis desiderat quam sunt necessariae. *Margaritis*, inquit Plinius, <sup>m</sup>*pretia luxuria fecit.* Et Cicero Verrina de signis: *Qui modus est in his rebus cupiditatis, idem est aestimationis.* Et contra evenit ut res maxime necessariae minoris sint propter copiam. Quod Seneca multis exemplis ostendit libro de *Beneficiis* vi. cap. 15, ubi et hoc addit: *Premium cuiusque rei pro tempore est: cum bene ista laudaveris, tanti sunt quanto pluris venire non possunt.* Paulus jurisconsultus: *Pretia rerum non ex affectu, nec utilitate singulorum, sed communiter funguntur;* id est, ut alibi explicat, *quanti omnibus valeret.* Hinc fit ut res tanti aestimetur, quantum pro ea communiter offerri aut dari solet, quod vix est ut non aliquam latitudinem habeat, intra quam plus minusve dari aut exigi possit, nisi *etiam hominum aestimatione, quorum certe natura tanta est dignitas, plerumque carius comparetur equus quam serrus, gemma quam famula?* ita in tali libertate judicandi plurimum distat ratio considerantie a necessitate indigentis, seu voluptate cupientis, cum ista quid per se ipsum in rerum gradibus pendat, *necessitas autem quid propter quid expelat, cogitet; et ista quid verum luci mentis appareat, voluptas vero quid jucundum corporis sensibus blandiatur, exquirat.*

<sup>L. 63. D. ad l. Faec.</sup>

<sup>L. 33. D. ad Leg. Aquil.</sup>

<sup>m</sup> *Communiter funguntur]* Plin. Lib. xviii. c. 31. *Æqui patrisfamilias modus est, annona cuiusque anni uti.*

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XIV. 1 The most natural measure of the value of any thing is the need for it, as Aristotle rightly shews: which is seen most clearly in the exchange of things amongst barbarians. Yet this is not the only measure. For the will of men, which is the master of things, desires many things more than are necessary. *Pearls*, says Pliny, derive their value from luxury. And so Cicero of pictures: the measure of man's desires in these things is the measure of value. And, on the other hand, it comes to pass that the most necessary things are of small value for their abundance. So Seneca shews by many examples, and adds, *The price of any thing is a temporary accident: however much good you may say of them, they are worth just so much as they will fetch when sold.* So Paulus, *The prices of things are not from the opinion or utility of individuals, but are a common function;* that is, as he explains elsewhere, what they would be worth to people in general. Hence it comes to pass that a thing is supposed to be of such value as is given or offered for it commonly; which cannot help having a certain latitude, within which more or less may be given or

ubi lex certum rebus pretium ἐν στεγμῇ, ut Aristoteles loquitur, id est, *in puncto* constituit.

2 In communi autem illo pretio <sup>o</sup>ratio haberi solet laborum et expensarum, quas mercatores faciunt: soletque subito quoque mutari ex copia et inopia ementium, pecuniae, mercium. Ceterum possunt et quedam esse rei accidentia aestimabilia, ob quae res licite supra aut infra commune pretium ematur vendaturve, puta ob damnum consequens, lucrum cessans, affectum peculiarem, aut si in gratiam alterius res vendatur ematurve, alioqui non emenda aut vendenda; quae ipsa accidentia ei cum quo agitur indicanda sunt. Ejus quoque damni aut lucri cessantis ratio haberi potest, quod ex pretii solutione dilata aut anticipata nascitur.

XV. 1 De venditione <sup>7</sup> et emtione notandum, etiam sine traditione, ipso contractus momento transferri dominium posse, atque id esse simplicissimum: ita <sup>8</sup>Senecæ venditio alienatio est, et rei suæ jurisque sui in aliud translatio: nam et ita fit in permutatione. Quod si actum sit, ne statim

<sup>o</sup> Ratio haberi solet laborum et ex-  
pensarum] Nec improbat id Augustinus  
ad Ps. lxx. Sed ait ipse mercator: af-  
fero ex longinquæ merces: mercedem  
laboris mei unde vivam peto; dignus est  
enim mercenarius mercede sua: de men-

dacio et perjurio agitur, non de negotio.  
(§ 17. Ed. Benedictin. ubi verba paullo  
aliter leguntur).

<sup>7</sup> Circa hunc contractum vide PU-  
FENDORP. nostrum, *De Jure Nat. et*  
*Gent.* Lib. v. cap. 5. *J. B.*

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asked, except when the law has appointed a certain point of price for things, as Aristotle speaks.

2 For that common price, account is commonly taken of the labour and expense of the sellers, and it undergoes sudden changes according to the excess or defect of buyers, money, and wares. There may also be certain accidents of the things, capable of an estimation, on account of which the things may be lawfully bought or sold above or below the common price; suppose, on account of loss to be incurred, cessation of gain, particular tastes, or if they are bought or sold to oblige a person, being otherwise not to be bought or sold. Also account may be taken of the loss or cessation of gain which arises from the payment deferred or anticipated.

XV. 1 With regard to Buying and Selling, it is to be noted that the ownership may be transferred at the moment of contract, without delivery, and that this is the simplest process. So Seneca says, that selling is the alienation of the thing, and the transfer of one's property and one's right to another: as exchange also is. And if this be the case, if the ownership be not to pass immediately, the seller is

dominium transeat, obligabitur venditor ad dandum dominium, atque interim res erit commodo et periculo venditoris: quare quod venditio et emtio constat praestando, ut habere liceat, et evictionem, item quod res periculo est emtoris, et ut fructus ad eum pertineant antequam dominium transeat, commenta sunt juris civilis, quod nec ubique observatur: imo plerisque legum conditoribus placuisse, ut ad traditionem usque res commodo et periculo venditoris sit, notavit Theophrastus in loco, qui <sup>9</sup>apud Stobæum est, ubi et multa alia <sup>etiam 42</sup> instituta reperias de solennitate venditionis, de arrhabone, de poenitentia, multum differentia a jure Romano: sicut et apud Rhodios perfici solitam venditionem et contractus quosdam alias relatione in acta, notavit in Rhodiaca Dion Prusæensis.

2 Illud quoque sciendum, si res bis sit vendita, ex duabus venditionibus eam valitaram quæ in se continuuit præsentem dominii translationem, <sup>8</sup>sive per traditionem, sive aliter. Per hanc enim facultas moralis in rem abiit a venditore: quod non fit per solam promissionem.

<sup>9</sup> Seneca] *De Beneficiis* v. 10.

<sup>9</sup> Apud Stobæum est] Titulo de legibus.

<sup>8</sup> Ponit heic Auctor, in una venditione ab initio dominium translatum, in altera non; nec discriminem omne petit ex

traditione uni Emotorum facta, ut perperam intellexit PUFENDORFIUS, dicto capite, § 3. De vero sensu, et de re ipsa, diximus in notis nostris Gallicis ad hunc locum. J. B.

obliged to give the ownership [at an appointed time]. And in the meanwhile, the thing is in the possession and at the risk of the seller. Wherefore that selling and buying consist in giving the means of having the thing sold, and remedy if the title to it prove bad, and that the thing is necessarily forthwith at the risk of the buyer, and also that the produce belongs to the buyer even before the ownership passes, are all fictions of the Civil Law, and are not everywhere observed. Indeed most legislators have provided that up to delivery the possession and risk are the seller's, as Theophrastus holds: and as we find in Stobæus, where you find many other rules about the formalities of sale, about *earnest* of sale, about retraction, very different from the Roman Law: as also that among the Rhodians sale was to be completed, as well as some other contracts, by public registry, as Dio Prusæensis notes.

2 This also is to be observed, that if a thing be sold twice over, that sale of the two is valid which included a present transfer of the ownership either by delivery or otherwise. For by this means the jural claim passes from the seller, which it does not by a mere promise.

Arist. Pol. I.  
2.

Cap. 6.

XVI. Monopolia <sup>1</sup>non omnia cum jure naturæ pugnant: nam possunt interdum a summa potestate permitti justa de causa et pretio constituto: cuius rei exemplum nobis illustre præbet Josephi historia <sup>2</sup>cum is vice regia Ægypto præasset. Sic et sub Romanis Alexandrini Indicarum et Æthiopicarum mercium habebant, <sup>3</sup>ut Strabo loquitur, μονοπωλεῖαν. Potest et a privatis institui, æquo duntaxat compendio. At qui, ut in Velabro olearii, <sup>4</sup>de compacto id agunt, ut res supra pretium id quod summum nunc est in communi pretio vendantur, aut vi, aut fraude impediti ne major copia importetur, aut ideo merces coemunt ut vendant pretio quod tempore venditionis iniquum sit, injuriam faciunt, atque eam reparare tenentur. Quod si alio modo impediti invectionem mercium, aut ideo coemunt, ut pluris vendant, pretio tamen pro temporis ratione non iniquo, faciunt quidem adversus caritatis normam, quod multis evincit Ambrosius libro officiorum tertio, sed proprie jus alterius non violant.

XVII. De pecunia sciendum, eam naturaliter functionem recipere, <sup>5</sup>non in materia sola, nec in speciali appellatione

<sup>1</sup> Non omnia cum jure nature pugnant] Nota Thaletis *Historia de Olivitate*, [que varie a variis refertur. Vide Arist. *Politic.* I. 11. Diogen. Laert. I. 26. ibique Intt.] Pythoclis inventum de plumbō Tyrio coemendo, unde lucrum faceret Atheniensis populus, est apud Aristotelem *Economico* II. (pag. 510 D. E. Edit. Paris. Tom. II.) de monopolio erinaceorum, quibus expoliuntur

vestes, vide Plinium VIII. 37. de monopolio serici, Procopium in *Historia Armenia*. (Cap. 25.)

<sup>2</sup> Male quadrat exemplum, ut observavit PUFENDORFIUS, dicto loco.

<sup>3</sup> Ut Strabo loquitur] Libro XVII. (p. 798) vide et Cassiodorum 11, 4. et 26. [Istud quoque exemplum de Alexandrinis, non congruit. Inspice Strabonis locum. J. B.]

XVI. It is not all monopolies which are at variance with Natural Law. Monopolies may sometimes be permitted by the government for just cause, and at a settled price; of which we have a remarkable example in the account of Joseph's administration of Egypt. So under the Romans the Alexandrians had the monopoly of Indian and Ethiopian wares. Monopolies may also be established by private persons, provided they be on equitable terms. But if persons, like the Velabrian oil-merchants, enter into a combination to raise the price above the common price, or prevent by fraud or force the importation of a larger quantity, that they may buy up the article and sell it at a price which at the time of sale is unreasonable, they are guilty of a wrong, and are bound to repair it. If in any other way they prevent the importation of wares, in order to sell them at a higher price, though in the state of the market not an unreasonable one,

aut forma, sed in genere magis communi, qua scilicet comparatur ad res, aut omnes, aut maxime necessarias : quæ aestimatio, si aliud non convenerit, facienda erit tempore ac loco solutionis. Michael Ephesius ad quintum Nicomachiorum : *ως* <sup>Cap. 2.</sup> *ἐπὶ τῆς χρείας τούτῳ ἐπὶ τοῦ νομίσματος ἴδοι ἀν τις γηνόμενον· ως γάρ ἐπ' ἐκείνης οὐκ ἀεὶ ὁμοίως δεόμεθα καὶ ἐν χρείᾳ τῶν ἀλλοτρίων ἐσμὲν, οὔτως οὐδὲ τὸ νόμισμα ἀεὶ ἵσον δύναται, ἀλλὰ μεταπίπτει. καὶ τὸ πρότερον πλέον δυνάμενον ὑστερον ἡ ἔλαττον ἡ οὐδὲν ἰσχύει. ὅμως μᾶλλον γε τοῦτο διαμένει καὶ δεῖ ως μέτρῳ αὐτῷ τῶν ἀλλασσομένων χρῆσθαι. Quod de indigentia accidit, idem in numero videre est. Nam sicut ea non eadem semper, nec enim alienis rebus aequa semper opus est nobis, sic nec nummus idem semper valet, sed mutatur, et cum prius plus valuerit, postea aut minus aut nihil valet : <sup>\*</sup>diuturnius autem est nummi pretium : eoque ut mensura aliarum quæ comparantur rerum uti solemus. Cujus loci hic sensus est : quicquid adhibetur in hoc ut mensura sit rerum aliarum, debet esse tale, ut per se minime flectatur, talia autem sunt*

<sup>t</sup> *De compacto id agunt] Lex aequa et prudens est C. de monopolii, et locus notabilis apud Lysiam (Orat. xxii. cap. 5) adversus frumenti venditores, qui pretium falsis rumoribus incendebant. Adde Cassiodorum ix. 5. &c. quicunque, 9. causa xiv. questione iv.*

<sup>• Non in materia sola, nec in speciali appellations aut forma, sed in genere</sup>

*magis communi] Non tam ex substantia quam ex quantitate l. i. D. de Contrah. Emtione. Non corpora hic cogitanda, sed quantitas. l. Si is cui. § 1. de solutionibus L. 94.*

<sup>\* Diuturnius est nummi pretium]</sup>  
*Publica ac perpetua aestimatio d. l. i. D. de Contr. Em.*

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they offend against the law of charity; as Ambrose shews, but they do not properly violate the rights of others.

XVII. Concerning Money, it is to be noted that it naturally operates *functionally*, that is, one portion of it may do the office of another ; and this, not only as to the material [gold for silver and reciprocally], nor in its special appellation and form [crowns for dollars], but in a more general sense, in its relation to all other things, or at least to the most necessary ; and the estimation of this relation, if no other agreement is made, is to be made with reference to the time and place of payment. So Michael Ephesius says that money, though not in itself immutable, is the measure of all other things: the sense of which is this: that whatever is taken in order to be the measure of other things ought to be such that of itself it is least subject to change: and of this kind are gold, silver, brass: for their value is nearly the same at all times and everywhere: and as

in genere æstimabilium, aurum, argentum, &c: per se enim ferme tantundem ubique, et semper valent: sed prout res aliæ, quibus indigent homines, copiosæ sunt aut raræ, ita eadem pecunia ex eadem facta materia, eodem pondere, nunc plus nunc minus valet.

L. 2. D. Loc. XVIII. Locatio et conductio, <sup>1</sup>ut recte a Caio dictum est, proxima est venditioni et emtioni, eisdemque regulis consistit: respondent enim pretium pensioni sive mercedi, et rei dominium facultati utendi. Quare sicut res domino perit, ita naturaliter sterilitas, et alii casus, qui usum impediunt, damno sunt conductoris: neque eo minus locator jus habebit ad pecuniam promissam, quia ipse facultatem utendi tradidit, quæ eo tempore tantum valebat: quanquam et legibus et pactis immutari id potest. Si tamen locator, cum conductor primus re uti impeditus esset, alii eam locaverit, quicquid consecutus inde fuerit rependet primo conductori, ne ex re aliena fiat locupletior.

XIX. Et quod de venditione supra diximus, pluris rem vendi minorisve emi posse, si in gratiam alterius vendatur ematurve, alias non vendenda aut emenda, idem et de re aut

<sup>1</sup> Confer, de hoc contractu, PUEN-DORIUM nostrum, *De Jure Nat. et Gent.* Lib. v. cap. 6. J. B.

<sup>1</sup> Tantundem et de commodato dici potest] Valde enim affinia commodatum

et mutuum, ut locatio et fœneratio. in l. unica C. Theod. quod jussu est: pecuniam commodat. Justinianus edidit mutuam dat. Nummos autem fœnore sumtos conductos dixit Horatius Lib. i.

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other things which men need are plentiful or scarce, the same money of the same material and weight, is sometimes worth more of those things, sometimes less.

XVIII. Letting and Hiring, as Caius rightly says, come nearest to selling and buying, and are governed by the same rules; the price corresponds to the rent or wages, and the ownership to the use of the thing hired or service rendered. Wherefore as, when a thing is destroyed, the loss falls on the owner, so by Natural Law barrenness of land hired, and other accidents which impede the use, are at the loss of the Hirer; and nevertheless the Letter has a right to the rent promised, because he gave up the power of using the thing himself, which at the time of letting was worth so much; though this may be changed by laws and covenants. But if the Letter, when the first Hirer is prevented making use of the thing, lets it to another, whatever he receives from that bargain he must pay to the first Hirer, that he may not become richer by what belongs to another.

XIX. And what we said above of Selling, that a thing may be

opera locata conductave intelligendum est. Quod si una opera pluribus utilis esse possit, ut itineris susceptio, et locator pluribus se in solidum singulis obstrinxerit, poterit de singulis mercedem pacisci quam ab uno exigeret, ubi lex non obstat: quia quod illa opera secundo quoque utilis est, extrinsecum est contractui qui cum primo est initus, neque respectu primi quicquam minuit de aestimatione.

XX. 1 Circa mutuum quæsi solet, quo jure vetitæ sint usuræ? et quanquam jure naturali vetitas esse receptior est sententia, contrarium tamen sentit Abulensis. Neque vero In cap. xxv.  
Matt. q. 171.  
et 172. videntur argumenta, quæ in alteram adferuntur partem, talia esse ut assensum extorqueant. Nam quod de mutuo dicitur gratuitum esse, <sup>y</sup>tantundem et de commodato dici potest: cum tamen pro usu rei pretium exigere illicitum non sit, sed efficiat ut contractus in aliud nomen transeat. Nec magis urget quod suapte natura sterilis est pecunia. Nam et domos et res alias natura infecundas <sup>z</sup>hominum industria fructuosas fecit. Illud speciosius, <sup>z</sup>quod hic res pro re reddatur, usus autem rei a re distingui non possit, cum in abusu consistat, ac proinde pro eo nihil debeat exigi.

Sat. 2. (vers. 9) ubi scholiastes merces,  
usura.

<sup>z</sup> Hominum industria fructuosas fe-  
cit] Nec enim debet sterilis esse pecu-  
nia. I. quid ergo. 3. § Usuras. 4. D. de

Contrar. et Util. Act. Tutela. I. debitor.  
7. D. de Usuris.

<sup>z</sup> Vide quæ Auctor uberior dicit, ad  
solutionem istius difficultatis, in Adnot.  
ad Lucam vi. 35. J. B.

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bought or sold for more or less if it be done to gratify a person, being otherwise not open to be bought or sold, is to be understood also of a thing or of service let and hired. Or if one service may be useful to many persons, as, for instance, a journey undertaken by an agent, and if the latter (the agent) have engaged himself to several persons jointly, he may demand from each the payment which he would require from one, if the law do not forbid. For the same labour being useful to a second person as well as to the first, is something extrinsic to the contract entered into with the first, and does not diminish the value of his services to the first.

XX. 1 As to Lending Money, it is commonly made a question by what kind of law usury is forbidden. And although the more received opinion is that it is forbidden by Natural Law, Abulensis is of a contrary opinion. And in truth the arguments on the other side are not such as compel assent. For when it is said (1) That money lent is a gratuitous benefit, the same may be said of any other thing lent, and yet it is not unlawful to demand payment for

2 Sed notandum est, cum rerum, quæ usu pereunt, aut in alterius dominium transeunt, ususfructus senatus consulto introductus dicitur, non tamen effectum, ut proprius ususfructus esset, de voce ususfructus agi, quæ certe secundum suam proprietatem tali juri non congruit; non tamen sequi inde jus tale nihil esse, aut non aestimabile, cum contra certum sit, si quis proprietario tale jus cedat, pecuniam posse exigere eo nomine. Sic et jus illud nonnisi post tempus certum reddendi pecuniam aut vinum, est aliquid aestimabile: minus enim solvit qui tempore minus solvit. Atque ideo <sup>a</sup>εν ἀντιχροήσει usus pecuniae cum fructibus praedii compensatur. Quæ vero a Catone, Cicerone, Plutarcho, <sup>b</sup>et aliis contra usuras dicuntur, ea respiciunt non tam quod intrinsecum ei est, quam quod plerumque ei adest, eamque consequitur.

3 Sed quicquid hac de re sentire libeat, sufficere nobis debet lex a Deo Hebreis data, quæ vetat Hebreos Hebreis

<sup>a</sup> Εν διττοῖς] 1. cum debitor.  
8. D. in quibus causis pignus. 1. Si ea pactione. 14. C. de Usuris.

<sup>b</sup> Et alii] Ut Appiano in civilibus. (pag. 382 b. Ed. H. Steph.)

<sup>a</sup> Mutavit postea sententiam Auctor, ut patet ex ejus Epist. 953. ad Salmasium scripta; sed imprimis ex Adnotationibus ad dictum caput Lucæ, vi. 35. quæ hec omnino conferri debent. De

tota autem materia Fœnoris et Usurrum absolutissimum et plenissimum Opus existat summi Jurisconsulti, et non minus judicio, quam eruditio, insignis, Clariss. NOODTII, quod seorsim ante editum, inter Opera ejus postea recensum est. J. B.

<sup>c</sup> Honestæ moraliter] Hebrei censem voce ράβδον significari usuram in pecunia: voce ράβδον in quavis specie. Hierony-

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the loan of a thing; this only makes the contract take another name, *letting* instead of *lending*.

Nor is it more convincing to say (2) That money is barren by its nature; for houses and other things which produce no fruits by nature, the industry of man makes fruitful.

The other arguments are more specious, (3) That here, a thing of the same kind is repaid for a thing, and that the use of the thing, money, cannot be distinguished from the thing itself, since it consists in *abusu*, in getting rid of it: and therefore nothing ought to be demanded for it.

2 (4) It is said in the decree of the Senate\*, That though there cannot be properly *usufruct* of a thing which perishes in the using, yet there may be *quasi usufruct* of such a thing, but that it does not thereby become the property of the tenant. But this merely defines the word *usufruct*. Certainly that word does not properly agree with the right of usury. But it does not follow that there is no such right:

\* Under Tiberius. Heineoc. *Elem. Jur. Civ.* 419.

pecuniam dare fœnori: <sup>3</sup>Est enim hujus legis materia, si non necessaria, certe <sup>c</sup> honesta moraliter, unde et aliis maxime moralibus annumeratur Psalmo, qui apud Hebræos est decimus quintus, apud Latinos <sup>d</sup> decimus quartus, et apud Ezechielem capite decimo octavo: quæ autem hujus generis sunt, Christianos quoque obligant, quippe vocatos ad majora virtutum specimina: et quæ tunc officia homini Hebræo aut alioqui circumciso (nam hujus cum Hebræo par causa erat) præstari jubentur, ea nunc præstanta sunt homini cuivis, <sup>v. 5.</sup> <sup>e</sup> omni populorum discrimine per Evangelium sublati, latiusque extenso proximi intellectu: quod præter cetera ostendit <sup>Luc. x. 29.</sup> insignis Christi de homine Samarita apolodus. Itaque Lactan- <sup>v. 8.</sup> <sup>c. 4. Epist. Inst.</sup> tius de officiis tractans hominis Christiani: *Non dabit*, inquit, *in usuras pecuniam: hoc est enim de alienis malis lucra captare.* Ambrosius: *Subvenire non habenti humanitatis De off. iii. 3. est; duritiæ autem plus extorquere quam dederis.* Ipse

<sup>a.</sup> *Ed. Basil.)*

<sup>b.</sup> *Decimus quartus]* Et Ps. cxii. χρηστὸς δινῆρ ὁ οἰκτέρων καὶ κιχοῦν· *Vir bonus est, qui alterius miseretur,* eique pecuniam dat mutuam. (vers. 5.)

<sup>c</sup> *Omni populorum discrimine per Evangelium sublati]* Christianos Arnobius libro iv. (Pag. 152, 153.) sit esse communicatores rei, et cum omnibus quos solidet germanitatis necessitudine copulatio. Alibi: *qui omnes homines pro fratribus diligunt.*

<sup>d</sup> *Plus extorquere quam dederis]* Cyprianus de lapsis gravia peccata enumerans, addit *usuris multiplicantibus*

since, on the contrary, it is certain that if any one were to grant a proprietor such a right, money might be paid for it.

And the right of not having to repay anything, whether money or wine, till after a certain time, is something which has an estimable value. For he who pays later, pays less. And therefore, in the way of exchange the use of money may be paid for by the use of land.

As to what Cato, Cicero, Plutarch, and others say against usury, it does not touch its intrinsic nature, but its ordinary accompaniments and consequences.

3 But whatever may be our opinion of such arguments, it ought to suffice for us that there was a law given by God to the Hebrews, which forbade Hebrew to lend Hebrew money on usury. For the matter of this law, if not necessary, is certainly morally good; and so is assumed in Ps. xv. 5. Ezek. xviii. 8. And precepts of this kind bind Christians also, as being called to higher pitches of virtue than others; and what was then the duty towards a Jew, is now a duty to all men,

Suet. c. 39. Cæsar Augustus notavit aliquos, quod pecunias levioribus usuris mutuati, graviori fœnore collocassent.

XXI. Observandum tamen est, esse quædam <sup>s</sup>quæ ad usuræ speciem accedant, ac vulgo usuræ esse videantur, cum tamen pacta sint generis alterius: ut de repensando damno, quod facit qui pecuniam dat mutuam, eo quod diu pecunia careat: item de lucro ob mutui dationem cessante, deducto scilicet incerto spei, et labore qui subeundus fuerat. Sic etiam pro impensis ejus qui multis dat mutuam pecuniam, et in hoc paratam habet: et pro periculo amittendæ sortis, ubi idonee non cavetur, si quid exigitur, usura vere non est. Demosthenes oratione in *Pantænetum*, eum, qui quod ex mercatura aut honesta opera quæsivit <sup>h</sup>sub modico lucello elocat, partim

*fœnus augere.* (Pag. 124. Edit. Fell. Brem.) Chrysostomus de *Jejunio* v. éavι  
νηστεύεις βλέπε μή δανείσῃ τὸ ἀργύ-  
ριόν σου ἐπὶ τόκῳ. νηστεύεις; διάρ-  
ρηξον βιατῶν συναλλαγμάτων χειρό-  
γραφον. Si jejunas, vide ne pecuniam  
tuam colloces seniori: jejunas? rumpe  
violentorum pactorum cautiones. (Tom.  
vi. pag. 937.) Idem in caput ultimum  
i. ad Corinthios, (T. III. pag. 534) pe-  
cuniam fœnore partam non magis si  
in eleemosynam detur, Deo acceptam  
esse ait, quam si detur ex quaestu me-  
retorio. Augustinus epist. LIV. Quid  
dicam de usuri, quas etiam ipse leges  
et judices reddi jubent. Ita crudelior  
est, qui substrahit aliquid vel eripit di-  
viti, quam qui trucidat pauperem fœnore.

Maximus homilia III. de *Quadragesima*:  
recte frater frequentabis ecclesiam, si  
gressus tuos lethalibus laqueis avida illa  
non impliceret et involvat usura. His adde  
Basilium in sermones Domini in monte,  
et quæ ex conciliis sanctisque scripto-  
ribus colligit Gratianus causa XIV.  
quest. iii. et iv. [Nullæ sunt Homiliae  
BASILII Magni in Sermones Domini in  
monte: sed una est in Psalm. xiv. ad-  
versus Fœneratores, Tom. i. pag. 135,  
et seqq. Ed. Paris. 1638. quam Auctor,  
quam in animo haberet, ita, lapsu me-  
moriae, perperam designavit. J. B.]

<sup>s</sup> Quæ ad usuræ speciem accedant]  
Et si cum juris Romani consultis loqui  
volumus, fœnus odiosum nomen est,  
usura non item. *Usura non propter*

the separation being taken away by the Gospel, and the term *neighbour* more widely extended. So Lactantius and Ambrosius condemn usury. And Augustus noted for rebuke some who borrowed money at low interest and lent it at high.

XXI. It is to be observed, however, that there are some things which approach to the nature of usury, and commonly are held to be usury, which are pacts of another kind: as pacts for making good the loss which he suffers who lends money, by being kept out of his money so long: and on account of the gain which the money-lender loses by lending, deducting what corresponds to the uncertainty of his hopes, and the labour he would have had to undergo. And again, if anything be demanded on account of expenses incurred by him who lends money to many, and has it ready for that purpose; and for the danger of losing the principal, where due security is not taken; this

ut suum servet, partim ut gratum faciat alteri, negat fœnematorum odio prægravandum.

XXII. Leges vero humanæ quæ concedunt aliquid stipulari pro usu pecunia, aut rei alterius, ut apud Hollandos jam pridem concessum est aliis quidem <sup>1</sup> octo nummos in centum, mercatoribus autem duodecim pro usu annali exigere, siquidem vere stant intra compensationem ejus quod abest, aut abesse potest, non pugnant cum naturali aut divino jure: sin eum modum excedunt, <sup>2</sup> impunitatem præstare possunt, jus dare non possunt.

XXIII. Contractus avertendi periculi, quem <sup>1</sup> assecurationem vocant, omnino nullus erit si contrahentium alter rem, de qua agitur, aut salvam quo destinabatur pervenisse, aut

*lucrum petentium, sed propter moram solventium infliguntur.* I. cum quidam 17. § 3. D. de Usuris. Cujacius in *Paratillo de Nautico Fænore*: *Fænus est quod præter sortem accedit lucri causa: usura, quod accedit ne in damno veretur creditor.* Sed quis plerique etiam usurarum abusi sunt nomine, cœpit et hoc in sequiorem sumi partem: in bonum autem sensum substitui vox ejus quod interest.

<sup>1</sup> *Sub modo lucello]* Procopius Goth. III. in laudibus Germani, qui Justiniano propinquus: χρήματα τοῖς δεομένοις ἀπασι δεδανεικώς μεγάλα, καὶ τόκον οὐδὲ ὅσον λόγῳ κεκομισμένος πρὸς αὐτῶν πάποτε pecunias omnibus

*opus habentibus magnas dabat utendas, usuram autem, quæ guidem talis dici merebatur, nunquam ab ipsis sumebat.* (Cap. 40.)

<sup>1</sup> *Octo nummos in centum]* Idem in Imperio constitutum.

<sup>2</sup> *Impunitatem præstare possunt]* Ideo permissas ante se usuras ad normam æquiorem reducere Justinianus sui officii censuit: novellis XXXII. XXXIII. XXXIV.

<sup>1</sup> *Assecurationem]* Id damnum in se suscipere dixit Suetonius *Claudio*. (c. 18.) Sic Cicero pecunia publicas prædes accepit, ut populo cautum esset sine vectura periculo, epistolarum 11, 17.

is not usury. So Demosthenes in his oration against Pantænetus, denies that he is to be stigmatized as an usurer because, what money he gained by commerce or manufacture he lent out at moderate interest, partly to keep the capital, partly to gratify another.

XXII. Human Laws which allow something to be covenanted for the use of money, if the rate lie within a due compensation, are not opposed to Natural or Divine Laws, as in Holland it has long been granted to persons in general to require 8 per cent. per annum, and to Merchants 12. If they exceed that standard, laws may afford impunity, but they cannot give a right.

XXIII. Contracts for averting risk, which are called Insurance, are void if either of the contracting parties know that the thing insured has either reached its destination safely, or is lost: not only on account of the parity which the nature of permutatorial contracts requires, but also because the proper matter of this contract is loss

periisse sciverit: non tantum ob paritatem quam exigit contractuum permutatorum natura, sed quia propria materia hujus contractus est damnum sub ratione incerti. Periculi autem hujus pretium ex communi aestimatione petendum est.

XXIV. 1 <sup>m</sup>In societate negotiatoria, ubi confertur pecunia cum pecunia, si pecuniae aequales sint, aequales esse etiam oportet partes in damno et lucro; sin inaequales fuerint, partes quoque fient pro rata: quod Aristoteles fine octavi Nicomachiorum sic extulit: ἐν χρημάτων κοινωνίᾳ πλείω λαμβάνουσιν οἱ συμβαλλόμενοι πλείω. Atque idem habebit locum si opera aut aequales aut inaequales conferantur. Sed et opera cum pecunia, aut cum pecunia et cum opera conferri potest, ut dici solet.

Cap. 16.

Plaut. *Aarin.*  
l. 3. 20.Navar. 17. n.  
260.  
Covar. III.  
Var. cap. 2.  
Lem. II. 2, 25.  
dub. 3.

Par pari datum hostimentum est, opera pro pecunia.

2 Sed haec collatio non uno modo fit: nam aut opera confertur cum solo pecuniae usu, quo casu sors domino perit, et si salva est, domino salva est: aut opera confertur cum ipso dominio pecuniae, quo casu qui operam impendit particeps fit sortis. In prima specie comparatur cum opera non sors, sed periculum amittendae sortis, et lucrum quod probabiliter ex ea sperari poterat. In altera opera pretium ha-

<sup>m</sup> *In societate*] Exemplum societatis habes in delphinis apud Plinium, Lib. ix. cap. 8. et in pinna ac pinnotere ix. 42. meminit et Cicero *de Finibus*, (III. 19.)

*uncertain.* The value of such danger is to be sought in common estimation.

XXIV. 1 In' Partnerships in trade, where money and money are contributed by the parties, if the sums are equal, the gain and loss ought to be equally shared: if unequal, proportionally to the shares: Aristotle's rule. The same will hold if equal or unequal shares of labour are contributed. But money may be compared with labour, and labour with money. See Plautus.

2 But this joint contribution may be made in various ways: for either labour may be supplied by one party and the use of money (annual payment) by the other: in which case if the money-share be lost, the loss is the owner's, and if it be saved the gain is his: or labour and the ownership of money (capital) are the relative contributions; in which case he who supplies the labour partakes in the money-share. In the first case that which is compared with the labour is not the money-share, but the risk of losing it, and the gain which might be expected from it. In the other case the value of the labour is considered as something added to the money-share, and according to such value, he who supplies the labour has a share in

betur quasi sorti adjectum, et pro eo quod valet in ipsa sorte partem habet qui operam præstat. Quod de opera diximus, idem et de labore ac periculo navigationis, et similibus intellegi debet.

3 Ut autem sociorum aliquis lucri sit particeps, immunis damni, est quidem præter naturam societatis: potest tamen ita conveniri sine injuria: fiet enim mixtus contractus ex societate et ex contractu aversi periculi, in quo ita servabitur æquitas, si tanto plus lucri ferat, quam alioqui latus fuerat qui in se damnum recepit. Ut autem quis damnum sentiat sine lucro, ideo admittendum non est, quia ita naturalis est societati utilitatum communio, ut sine ea nequeat societas consistere. Quod autem dictum est a Jurisconsulto non expressis partibus æquales intelligi, ita demum pro vero habendum est, si quæ conferuntur sint æqualia. In societate autem universorum bonorum non id quod hinc aut illinc obvenit, sed quod probabiliter sperari poterat, comparandum est.

XXV. In societate navalii adversus piratas utilitas communis est ipsa defensio: interdum et præda. Solent autem æstimari naves, et quæ in navi sunt, atque ex his summa confici, ut damna quæ eveniunt, in quibus sunt et vulneratorum

<sup>4</sup> Circa hunc contractum confer Pu- Lib. v. cap. 8.  
FENDORPIUM, *De Jure Nat. et Gent.*

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the capital. What we have said of labour is also to be understood of the labour and risk of navigation, and the like.

3 That any one of the partners shall share the profit and not suffer by the loss, is against the nature of partnership; but such an agreement may be made without wrong. For then the contract will be a mixture of Partnership and Insurance; and the equality will be preserved, if he who in case of loss has taken the risk of loss, receives more of the profits in proportion. But that any one should bear the loss without profit is not to be admitted, because in partnerships the community of interests is so natural, that without it partnership cannot subsist. What the Jurists say, that when the shares are not mentioned they must be understood to be equal, is true only if the contributions are equal. And in the common undertakings of good men, we must compare, not what happens here or there, but what may be probably hoped.

XXV. In associations of shipowners for mutual protection against pirates, the common utility aimed at is the protection; sometimes also the taking of prizes (privateering). The custom is to value the ships and cargo and to make up a sum in this way, and to appor-

Angel. Verb.  
Societ. i. § 7.  
Sylv. Verb.  
Societ. i. q. 2.  
Navarr. 17.  
n. 253.  
Covarr. et  
Loc. d. Loc.  
L. Si non.  
D. pro Socia.

Liv. xxiii. 49.  
Arist. Pol.  
iii. 9.

impendia, ferantur a dominis navium et mercium <sup>n</sup> pro parte quam habent in ea summa. Et hæc quidem, quæ diximus hactenus, ipsi juri naturæ sunt consentanea.

XXVI. 1 Nec in his jure gentium voluntario quicquam mutatum appetet: uno excepto, quod insæqualitas rerum in quam consensum est, <sup>5</sup> ubi nec mendacium intercessit, nec ejus quod dictum oportuit reticentia, in actionibus exterioribus pro æqualitate habetur: ita ut quomodo jure civili ante constitutionem Diocletiani actio in foro nulla dabatur aduersus tales insæqualitatem, ita nec inter eos qui jure gentium solo sociantur exactio aut coactio sit eo nomine. Hoc enim L. 16. § 4. D. est quod ait Pomponius, in pretio venditionis et emtionis de Minor. L. 22. § 7. D. naturaliter licere se mutuo circumvenire: ubi licere est non Locat. quidem fas esse, sed ita permitti ut nullum contra proditum sit remedium in eum qui se pacto velit defendere.

2 <sup>n</sup>Naturaliter autem eo in loco, ut et alibi interdum, possum est pro eo quod recepti passim moris est: quomodo apud 1 Cor. xi. 14. Apostolum Paulum ipsa natura docere dicitur viro turpe esse comam alere, cum tamen id neque repugnet naturæ, et multos apud populos usitatum sit. Sic idolorum cultores, non autem quosvis homines φύσει ματαίους, id est, *natura vanos* appellat scriptor libri Sapientie, et τέκνα φύσει ὄργης xiii. 1.

<sup>n</sup> Pro parte quam habent in ea summa] Vide simile in l. Wisigothorum, Libro v. tit. v. c. 5.

<sup>5</sup> Confer heio PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. v.

cap. 3. § 9. J. B.

<sup>o</sup> Naturaliter autem eo in loco] Sic Gellius, Lib. ix. c. 10. *de Actu Conjugali: rem naturæ lege operiendam.*

<sup>e</sup> Post primam istius Operis recen-

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tion the losses which take place, among which are the expenses of the wounded men, among the owners of the ships and cargoes according to their proportion of that sum. And what we have hitherto said on this subject is agreeable to Natural Law.

XXVI. 1 Nor in these matters is anything changed by the instituted Law of Nations; excepting this only, that if an inequality of the contributions be agreed upon, this, where there is neither false declaration nor reticence of what ought to have been said, is in exterior actions held for equality. And thus, as by the Civil Law before Diocletian there was no action before a court of law for such inequality, so now among those who are connected only by the Law of Nations, there is no demand or compulsion allowed on that account. This agrees with what Pomponius says, that in the price of selling and buying, it is naturally allowed to men to circumvent one another: where *allowed* means, not that it is right, but that there is such per-

ducendi, ad præcidendas controversias infinitas, et ob incerta rerum pretia inter eos, qui communem judicem non habent, inexplicabiles, quæ vitari non poterant si ob inæqualitatem a pactis discedere licuisset. *Hæc est emtionis atque venditionis substantia* (aiunt Imperatores, substantiæ nomine motrem perpetuum significantes) *quod emtor viliore comparandi, venditor cariore distrahendi votum gerentes ad hunc contractum accedant, vixque post multas contentiones, paulatim venditore de eo quod petierat detrahente, emtore autem huic quod obtulerat addente, ad certum consentiant pretium.*

*L. 6. de Bcn. 15. Si Volun. & C. de Rec. Venda.* Seneca ait hoc jus respiciens: *Quid interest quanti sint, cum de prelio inter ementem et vendentem convenerit?* *Nihil venditori debet qui bene emit.*

*Nic. v. 5.* Andronicus Rhodius sensu eodem: *τὸ γὰρ ἐν τοῖς ἐκονσιοῖς συναλλάγμασι κέρδος οὐτε ἀδικόν ἔστιν, οὐτε εὐθύνεται. τούτων γὰρ ἀδειαν ἔδωκεν ὁ νόμος.* *Lucrum, quod voluntate contrahentium percipitur, nec injustum est, neo corrigitur.* *Ejus enim rei licentiam lex concessit.*

*Apud Phot. Cod. 242. p. 1044.* 4 Is, quem indicavi paulo ante, scriptor ritæ Isidori, minoris justo emere, aut pluris vendere, vocat ἀδικίαν ὑπὸ μὲν τοῦ νόμου ἀφειμένην, τὸ δὲ δίκαιον ἀνατρέποντα· *injustitiam a lege quidem permissam, sed quæ re ipsa justum pervertat.*

ciosi querela instituitur. l. 19. mater. l. nam etsi. 15. l. circa. 24. D. *de Inoff. Testament.* addita l. cum duobus 13. C. eodem titulo.

<sup>4</sup> *Post multas contentiones]* Festus: *Cociones dicti videntur a cunctatione, quod in emendis vendendisque mercibus*

*tarde perveniant ad justi pretii finem, itaque apud anticos prima syllaba per U literam scriebatur. Quintilianus declamatione pro civibus: diu concionatus est. (Decl. XII. pag. 218. Ed. Obrecht.)*  
<sup>7</sup> *Vertendum erat: quod in Contractibus voluntariis, &c. J. B.*

evident, in order to obviate infinite controversies, which could not have been put on clear grounds in consequence of the uncertain prices of things among those who have no common judge, and which would have occurred if it had been reckoned lawful to depart from pacts on account of the inequality of conditions. So the Imperial Laws recognize Buying and Selling as being the result of long haggling and final agreement. So Seneca, and Andronicus Rhodius.

4 The writer of the life of Isidore calls this, injustice allowed by law.

## CAPUT XIII.

### DE JUREJURANDO.

- I. *Jurisjurandi quanta vis sit etiam ex paganorum opinionie.*
- II. *Animum deliberatum requiri, nempe ut quis jurare voluerit.*
- III. *Verba jurantis obligare in sensu quo ea creditur accepte cui juratum est.*
- IV. *Juramentum dolo elicium quando obliget.*
- V. *Juramenti verba non extendenda ultra receptum loquendi morem.*
- VI. *Juramentum non obligare de re illicita factum:*
- VII. *Aut quod impedit maior bonum morale:*
- VIII. *Aut si factum sit impossibile:*
- IX. *Quid si impossibile sit ad tempus?*
- X. *Jurari Deo nominato, et quo sensu:*
- XI. *Sed et nominatis rebus aliis, cum respectu ad Deum.*
- XII. *Juramentum esse etiamsi per falsos Deos juretur.*
- XIII. *Effectus jurisjurandi: inde obligatio ex jurejurando duplex, tempore jurisju-*
- randi, et postea: quod distincte explicatur.*
- XIV. *Quando ex jurejurando jus queratur homini et Deo, quando Deo tantum.*
- XV. *Refellitur sententia statuens eum, qui pirate aut tyranno juravit, Deo non teneri.*
- XVI. *Qui perfido juravit, an implere debeat, distinctione explicatur.*
- XVII. *Cum Deo soli quis obligatus fuit, heredem ejus ad nihil teneri.*
- XVIII. *Perjurum non esse, qui non implet nolenti impleri, aut sublata qualitate ejus, cui sub illa qualitate juratum est.*
- XIX. *Quando irritum sit, quod contra juramentum fit.*
- XX. *Superiorum actus quid possit circa id, quod subditus juraverit, aut quod subdito juratum est, cum distinctionibus exponitur.*
- XXI. *Monita Christi de non jurendo, ad quale juramentum proprio pertineant.*
- XXII. *Quae fides injurata jurementi vim ex more habeat.*

I. 1 **A**PUD omnes populos et ab omni aëvo circa pollicitationes, promissa et contractus, maxima semper vis fuit jurisjurandi. <sup>1</sup>Nam ut Sophocles ait Hippodamia :

Apud Stob. Scrm. 27.

<sup>1</sup> Confer PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. iv. Cap. 2. J. B.

### CHAPTER XIII. Of Oaths.

I. 1 Among all peoples, and in every age, the force of Oaths in proposals, promises, and contracts, has always been very great. So Sophocles in the Hippodamia ; Cicero.

Mens excitari jurejurando solet,  
Ut bina diligenter evitet mala,  
Culpari amicis, et Deos offendere.

*Orc. III. 20.* *Nullum vinculum, inquit Cicero, ad adstringendam fidem maiores nostri jurejurando arctius esse voluerunt.*

2 Hinc gravis poena perjuris imminere nunquam non  
*Theog. v. 231.* credita: ut Hesiodus dixit de juramento:

Clades mortalibus unde  
Adveniunt, quoties fallaci pectore jurant.

*Lib. vi. 86.* <sup>a</sup>Ita ut posteritas etiam majorum delicta lueret, quod non nisi de gravissimis criminibus creditum: et sine facto voluntas quoque poenam in se accenseret: quorum utrumque Herodotus confirmat narratione de Glauco Epicydide, qui deliberaverat tantum, an juratam de deposito fidem falleret: ubi hoc carmen Pythia adfert idem Herodotus:

At juramento quedam est sine nomine proles  
Trunca manus et trunca pedes: tamen impete magno  
Advenit, atque omnem <sup>b</sup>vastat stirpemque domumque.

*Sat. xiii. 203.* Et eandem historiam recitans Juvenalis ita concludit:

Has patitur poenas peccandi sola voluntas.

*Orc. III. 29.* 3 Bene Cicero: *Est iurandum affirmatio religiosa;*

<sup>a</sup> Ita ut posteritas etiam majorum delicta lueret] Vide Servium in excerptis Fuldenibus ad 1. *Aeneidos.* [Nihil ibi invenio, quod ad rem faciat. Vide ipsum Poetam, *Georg. I. 502. J. B.*] <sup>b</sup> Vastat stirpemque domumque] Vide Zachariam, v. 3, 4. et interpretem ejus loci Chrysostomum de Statu xv. (Tom. vi. pag. 565. Ed. Sacil.)

<sup>c</sup> Ut de Cydippe narratur] Exstat similis narratio in metamorphosis Antonini Liberalis de Ctesylla et Her-

2 And a heavy punishment was understood to await the perjured: so Hesiod. So that the posterity would have to expiate the crime of their ancestors, which was only believed in the case of the greatest crimes: and it was believed that even the will to commit perjury, without the deed, would bring down punishment. See Herodotus in the story of Glaucus, and Juvenal.

3 Cicero says well, *An Oath is a religious affirmation: what you promise solemnly, God being referred to as witness, is to be kept.* What he adds, *For then the matter pertains, not to the anger of the gods, for there is no such feeling, but to justice and good faith,* is not to be rejected, if by anger he understands a perturbation, a passion: but if a purpose or will of punishing, is by no means to be received, as Lactantius proves.

Let us now see whence the force of an Oath arises, and to what it tends.

*quod autem affirmate quasi Deo teste promiseris, id tenendum est.* Quod autem addit: *Jam enim non ad iram Deorum, quæ nulla est, sed ad justitiam et fidem pertinet: si iræ nomine perturbationem intelligit, non improbandum est; sin qualemcumque nocendi affectum aut voluntatem, minime est recipiendum, ut recte probat Lactantius.* Nunc unde vis <sup>L. de Ira</sup> <sub>Def.</sub> *jurisjurandi oriatur, et quo pertingat usque videamus.*

II. Primum quod de promissis et contractibus diximus, et hic habet locum, ut animus rationis compos et deliberatus requiratur. Quare si quis non putans se jurare verba protulerit jurantia, <sup>c</sup>ut de Cydippe narratur, locum habere potest quod ei tribuit Ovidius (Epist. *Heroid.* xxi. 135):

<sup>d</sup>Quæ jurat mens est: nil conjuravimus illa.

ex Euripide desumtum qui in *Hippolyto* dixerat (ver. 612):

Jurata lingua est: <sup>e</sup>mente juravi nihil.

Quod si quis volens jurare obligare se noluerit, non eo minus obligatur, quia obligatio a juramento est inseparabilis, et effectus ejus necessarius.

Soto, viii. q. 1.  
art. 7.  
Covarr. ad c.  
Quamv.  
Part. 1, § 5.

III. 1 At si quis deliberato protulerit verba jurantia, animo tamen non jurandi, hunc non obligari sunt qui tradunt, peccare tamen temere jurando. Sed verius est teneri eum

mochare, (cap. 1.)

<sup>d</sup> Quæ jurat mens est] Ibidem:  
Consilium prudensque animi sententia jurat,  
Et nisi judicii vincula nulla valent,  
(vera. 137, &c.)  
mox:  
Sed si nil dedimus preter sine pectore vocem,

Verba suis frustra viribus orba tenes.  
Non ego juravi: legi jurantia verba.  
et quæ sequuntur.

<sup>e</sup> Mente juravi nihil!] Quia de re honesta tacenda, nutricis verba intellexerat Hippolytus, non de adulterio et incestu.

II. First, that has place here, which we said of promises and contracts, that there is required a mind master of its reason and deliberate. Hence if any one, not thinking to swear, utters the words of an oath, it is not swearing. See in Ovid the story of Cydippe, [who read aloud on an apple which Acontius her lover had thrown at her, *I swear that I will marry Acontius.*] So Euripides in the Hippolytus.

But if any one, willingly swearing, wished not to bind himself, he is not the less obliged, because obligation is the necessary effect of an oath, and inseparable from it.

III. 1 But if any one utters the words of an oath, but with a purpose of not swearing, there are writers who hold that he is not bound, but that he sins by swearing rashly. But the sounder opinion is, that he is bound to make true the words to which he took God to

*De Offic. iii. 22.**Odysse. v. v. 188.**Hist. lv. 41.**Epist. cxxiv.*

vera facere dicta quorum Deum adhibuit testem: nam is actus, qui per se est obligatorius, ex animo deliberato processit. Cui consequens est ut quanquam plerumque verum est illud Tullii; *Quod ex animi tui sententia juraveris, id non facere perjurium est*; quo et illud pertinet quod apud Homerum jurans Ulyssi Calypso ait:

Ἄλλὰ τὰ μὲν νοέω καὶ φράσσομαι.

Verum animus quod sentit idem loquar.

2 Id tamen hanc exceptionem habeat, nisi qui jurat sciat, aut probabiliter credat, ab eo quicum negotium est, verba aliter accipi: nam dictis ipsis testem adhibens Deum, debet dicta facere vera <sup>1</sup>quomodo putat intelligi. Et hoc est quod idem ait Cicero: *Quod ita juratum est, ut mens deferentis<sup>2</sup> conciperet fieri oportere, id servandum est.* Apud Tacitum legimus: *Trepidis et verba jurisjurandi per varias artes mutantibus, queis flagitiis conscientia inerat.* Au-gustinus: *Perjuri sunt qui servatis verbis exspectationem eorum, quibus juratum est, deceperunt.* Et <sup>3</sup>Isidorus: *Quacunque arte verborum quis juret, Deus tamen, qui*

<sup>1</sup> *Quomodo putat intelligi?*] Augustinus epistola ccxxxiv. de illo locutus qui a Punicis castris egressus in castra redierat, inde Romam venerat: *ita non attenderunt qui illum Senatu moverunt, quid ipse jurando cogitasset, sed quid ab illo quibus juraverat exspectarent.* (*Epist. 125. novæ Edit. Benedictin.*) Vide et sequentia. Vide ad hanc rem pulchre dicta concilio Trosleiano tomo III. conciliorum, editionis Sirmondianæ. Et apud Hincmarum in opusculo *de Divortio Lotharii et Thietherge ad interrogationem vi.* ubi in hanc sententiam recte de Deo dicitur:

Qui non ut juras, sed ut in jurasse putavitis  
Cui juras, audit: sic es utique reus.

In professione jurata Hebraeorum per Hispaniam: *Si non ea intentione perficeris, sicut a nobis me profidente auditæ intellecta sunt.*

<sup>2</sup> Vox illa *deferentis* abest ab optimis Editionibus. Omnino agitur ibi de animo jurantis, non de sensu quem verbis ejus tribuit is, qui defert jusjurandum. Adeoque locus nihil ad rem facit, ut dudum observavimus ad *PUPENDORIUM nostrum*, dicto capite, § 15. Not. 2. *J. B.*

<sup>3</sup> *Isidorus]* Lib. II. *de Summo Bono*

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witness: for that act, which is of itself obligatory, proceeded from a deliberate mind. And hence it follows that, as Cicero says, not to do what you intentionally swear is perjury. See Homer.

2 This is so, with the exception of the case in which you who swear, know or believe that he with whom you have to do takes your words otherwise: for in taking God to witness his words, he ought to perform them as he supposes them to be understood. So Cicero regulates an oath by the *mens deferentis*, the mind of the proposer. Tacitus speaks of men in fear changing the words of the oath: Au-

*conscientiae testis est, ita hoc accipit sicut ille cui juratur intelligit.* Atque hoc est quod dicitur <sup>b</sup> liquido jurare. Ideo Metellus recte recusavit jurare in legem Apuleianam, App. de Bell. Civ. i. p. 368. quanquam erant qui dicerent legem ob rogationis vitium esse irritam, et juramentum in legem ita intelligendum, si lex rite rogata lataque esset.

3 Nam quanquam in promissis aliis facile subintelligitur tacita aliqua conditio, quæ promissorem exsolvat, id tamen in juramento admittendum non est: quo pertinet egregius ille locus Apostoli ad Hebræos: *Deus volens abundantissime heredibus promissionis ostendere immutabilitatem consilii sui, fidem fecit jurejurando: ut per duas res immutabiles, in quibus fieri non potest ut fallat Deus* (ita recte verti puto illud *ψεύδεσθαι*, sicut aperta locutio vocatur veritas, Dan. vii. 16, viii. 26, x. 1), *firmum habeamus solatum.* Quæ verba ut intelligentur, sciendum est sanctos scriptores de Deo sæpe loqui *ἀνθρωποπαθῶς*, et magis secundum id quod videtur nobis, quam quod est.

4 Nam Deus vere decreta sua non mutat. Mutare ta-

cap. xxxi. 1. citatur causa xxii. quæst. v. c. quacumque. 9.

<sup>b</sup> *Liquido jurare]* Donatus ad illud in *Andria* (iv. 3, 12):

Quia si forte opus ad herum jurejurandum mihi,

Non apposuisse, ut liquido possim.

*Liquido; pure; et manifeste.* χρεῖν μὴ ὑπονοθεῖν ἐτέρᾳ φράσει τὰ ρῆματα, ἀλλ' ὡς ἐτί λέξεων εἰχον, οὐτωσὶ καὶ δηλοῦν, ait in Alexio Nicetas fraudem Andronici Comneni culpans. Oportuit non quærita locutione verba adulterare, sed ut concepta ea fuerant eloqui. Qui et alibi, de Alexio contra

sensum verba captante: τοῖς ρῆμασι τούτοις ἔγκαθίσας, ὡς αἱ μνήσαι τῷ μάλα ποτὲ ita verbis illis insidebat ut μυστικά τιβici. Graviter in hanc regulam peccavit aula Arcadiana, quæ effecit ut Chalcedone occideretur is qui Constantinopolim, salutē ipsi per jurisjurandum promissa, venerat. Zosimus, Lib. v. Adde quæ infra cap. xvi. 2. [Duo loca NICETΑ unum idemque sunt, et in posteriore etiam de Andronico Comneno agitur, non de Alexi: Lib. i. cap. 3. in Alex. Locus autem Zosimi (non Sozomeni, ut habuerant hactenus Edd. post illam 1042. ubi Zozomenus, cor-

gustine, of men keeping the words and balking the expectation. So Isidore. To swear without reserve is *liquido jurare*. So Metellus, rightly, would not swear to the Apuleian law, though it was void, as being informally passed.

3 For though in promises some tacit condition may be understood which absolves the promiser, that is not so in an Oath. So St Paul, Heb. vi. 18, That by two immutable things, in which it was impossible for God to deceive: speaking after the manner of men.

4 For God does not really change his decrees. He is said to

*Jona* iv. 2. men et <sup>1</sup>poenitentia duci dicitur, quoties aliter agit quam verba sonare videbantur, nimirum <sup>k</sup>ob conditionem tacite intellectam, quæ cessat. *Jer.* xviii. 8. Exempla videre est *Gen.* xx. 3; *Exod.* xxxii. 14; *1 Reg.* xxi. 28; *2 Reg.* xx. 1; *Esaiæ* xxxviii. 1; *Jonæ* iii. 5, 11. Quo sensu etiam nos fallere Deus impropriæ dici potest. Et solet vox ψεύδεσθαι, quæ in dicto loco ad *Hebræos* apparet, significationem habere eventus spem frustrantis, ut videre est tum alibi, tum *Levit.* vi. 2; *Josue* xxiv. 27; *Esai.* lviii. 11; *Os.* ix. 2; <sup>1</sup>*Abac.* iii. 17. Facillime autem hoc procedit in comminationibus, quia illæ jus nemini conferunt. In promissis interdum, ubi scilicet conditio tacita quædam subest.

5 Ideo duas res Apostolus nominat quæ immutabilitatem notant, promissionem, quia jus dat; et juramentum, quia conditiones tacitas et aliquo modo latentes repellit: ut videre est etiam *Psal.* lxxxix. 30, 31, 32, 33, 34, 35, 36. Nam aliud est si quas conditiones ipsa negotii natura aperte indicet.

rupte) est cap. 18. *Ed. Cell.* Lib. laudi v. *J. B.]*

<sup>1</sup> *Poenitentia duci dicitur]* Concilium Toletanum viii. cap. 2. *Jurare namque Dei est a seipso ordinata nullatenus concellere, penitere vero, eadem ordinata cum voluerit, immutare.* Retulit Gratianus in causam xxii. quæst. iv. c. 9. Explica vero ut in textu nostro.

<sup>k</sup> *Ob conditionem tacite intellectam]* Senecam vide *Naturalium Questionum* 11, 37.

<sup>1</sup> *Abac.* iii. 17.] Adde *Jobum* xl. 28.

*Oseam* ix. 2.

<sup>m</sup> *Supporuisse quod revera se ita non habeat]* Ut Hippolytus, de quo modo diximus. Ad illud Sophoclis in *Oedipe Coloneo* (vers. 226):

'Απέτια δ' ἀπάται,  
'Ερέπαις ἐέρα παραβαλλομένα,  
Πόρον οὐ χάριν ἀντίδοσις ἔχει.  
Fraudus ad fraudem superacedens,  
Non benefactis, sed atrocē solet  
Cladō rependi.

Sic ait, καὶ αὐτοὶ οὖν νομίζουν στρατεύεσθαι αὐτὸν καὶ ἐπηγγέλθαι τὴν ασ-

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change and to repent, when he acts otherwise than the words seem to imply, which he does on account of a condition tacitly understood, which has ceased. See the passages. And in this senso God may improperly be said to *deceive* us; the word often meaning to *frustrate hope*. See the passages. And this appears more plainly in threats, because they give no right: sometimes in promises, where there is a tacit condition.

5 Therefore the Apostle speaks of two things which mark immutability; the promise, which gives the promisee a right; and the oath, for that repels tacit and latent conditions. See the Psalms as quoted. For it is another thing if any conditions are openly indicated by the nature of the transaction. And to this some refer Numb. xiv. 30: *Ye shall not come into the land concerning which I swore to make you dwell therein.* But it is more exact to say that the land was sworn, not

Quo nonnulli referunt id quod legitur Num. xiv. 30. Sed verius est terram promissam jurato dici ipsis, non personis, sed populo, posteris scilicet eorum quibus Deus juraverat, com. 23. Talis autem promissio impleri quovis tempore potest, nec personis certis adstringitur.

IV. 1 Ex his quæ diximus intelligi potest quid sentendum sit de jurejurando quod dolo elicium est. Nam si certum est, eum qui juravit aliquod factum <sup>m</sup>supposuisse, quod revera se ita non habeat, ac nisi id credisset non fuisse juraturum, non obligabit juramentum. At si dubium sit, an non etiam sine eo idem fuisset juratus, standum erit verbis, quia simplicitas quam maxima juramento convenit.

2 Atque hoc referto jusjurandum, quod Josue et primores <sup>Jos. ix.</sup> populi Israëlitici Gabaonitis dederunt. Decepti quidem erant a Gabaonitis, e regione longinqua se venire fingentibus. At non <sup>3</sup>inde sequebatur Josuam et primores, si scissent ex vicinis populis eos esse, non fuisse eis parcituros. Nam quod

φάλειαν αὐτῷ, ἀπατώμενοι καὶ οὐ πρότερον ἐπεγνωκότες, ὅτι οἰκεῖαι ἐνέχεται μάστιστος· τοιοῦτον δέτι καὶ τό·

"Η γάστος ὄμωμος, η δὲ φρήν ἀνάρτος.

Καὶ ἔκεινος γὰρ ἀπατηθεὶς ὡμοσε. Putant Thebani se suscepto Ἀδιποδί promiseisse incolumentem, causa ab ipso data, cum non ante didicissent piaculo eum domesticō teneri. Tale et illud.

Jurata lingua est: mente juravi nihil.

Namque et Hippolytus deceptoris juraret. [In verbis Scholiastæ tria erant mendacia, quæ sustuli. Sed et in ultimo versu

Sophoclis, pro ἀντίδοσιν ἔχει, optimæ Editiones, ut illa H. Stephani, habent, ἀντίδιδωσιν ἔχειν. Sensus autem totius loci hic est: *Qui sese exponit periculo fraudis ricissim excipiendo ab eo in quem fraude usus est, ille non beneficia, sed molestias et dolorem sibi repensem iri, sperare debet.* Ita, ni fallor, accurriator est versio, quam auctoris nostri. J. B.]

<sup>3</sup> At vide quæ diximus in PUFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. ii. § 7. not. 1. J. B.

to the individuals, but to the People, namely, the posterity of those to whom God had sworn, as ver. 23. Such a promise may be fulfilled at any time, and is not restricted to certain persons.

IV. 1 From what has been said, it may be understood what is to be judged of an oath obtained by fraud. For if it be certain that the swearing supposed some fact which is not so, and would not have sworn except he had so believed, then the oath is not binding. But if it be doubtful whether, even without that fact, he would not have sworn the same, he must stand by his words, because simplicity in the highest degree is suitable in swearing.

2 To this I refer the oath of Joshua and the elders of Israel to the Gibeonites, Josh. ix. They were deceived by the simulation of the Gibeonites, but it did not follow that Joshua and the Israelites, if they knew that they were neighbours, would not have spared them. For

dixerant Gabaonitis: *fortassis in medio mei habitas, quomodo tecum paciscerer?* hunc habere sensum potest, ut interrogentur Gabaonitæ quale pactum desiderent, sociale a<sup>n</sup>deditio*n*is; aut etiam ut ostendant Hebræi licitum sibi non esse cum quibusdam populis foedus inire sociale: non etiam ut negent dedentibus se vitam relinqu<sup>i</sup> posse. Lex enim divina, quæ eos populos interne*c*ioni devovebat, "ex legis alterius comparatione ita erat intelligenda, ut locum haberet nisi si qui moniti statim facerent imperata. Quod inter alia probat historia Rahabæ, <sup>o</sup>cui ob bene merita parcitum est, et Solomonis, qui Cananæorum reliquias sub imperium ac tributum accepit.

*Deut. xx. 10.*

*Jos. II.*

*1 Reg. ix. 21.*

*xi. 19, 20.*

3 Atque huc pertinet quod in Josuæ libro dicitur, nullam fuisse civitatem ex populis septem quæ pacem fecerit; obduratos enim ne gratia illis fieret. Quare cum credibile esset, si rem ipsam Gabaonitæ indicassent, quod præ metu non fecerunt, tamen vitam salvam sub parendi conditione impetraturos fuisse, valuit jusjurandum, adeo quidem, ut et de

<sup>■</sup> *Ex legis alterius comparatione]*  
Imo et ex causa legi de interne*c*ione addita. Exodi xxiii. 33. Deut. vii. 4. cessat enim ea causa in illis qui præcepta filiorum Nœ suscipiunt, et tributa pendunt. Ita Maimonides, et Samson Micosi, et Moses de Kotzi, in præcepto iudeo xv. et CXVIII.

<sup>○</sup> *Cui ob bene merita parcitum est]*  
Et Gazere habitantium in historia Josue xvi. 10. Gergesæos ad Christi us-

que tempora superstites fuisse ex evangelio apparuit Matth. viii. 28. nam hi ab initio se dediderant: ideo omittuntur in hostium enumeratione. Deut. xx. 17. Jos. ix. 1.

<sup>p</sup> *Ambrosius]* *De Officiis*, iii. c. 10.  
<sup>q</sup> *Personaliter cuidam servituti]* Ut Bruttiani olim a Romanis. Gellius x. 3. Festus verbo Brutiani.

<sup>4</sup> *Hac fuisse mera cavillatio, si juramentum, in se spectatum, validum*

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what they said, ver. 7, *Peradventure ye dwell among us, and how shall we make a league with you?* may be understood as an inquiry whether the Gibeonites asked for a league of equality or of submission; or that they might show that it was not lawful for the Hebrews to make leagues with certain peoples; not to imply that they would not spare their lives if they surrendered. For the divine law, which devoted those peoples to destruction, was to be understood by comparison with the rest of the law, in such sense that it was to take its course except any one attended to the warning, and did what was commanded them. This appears in the history of Rahab, who was spared; and of Solomon, who put the remainder of the Canaanites under a tribute of bond-service.

3 And to this view belongs what is said in the book of Joshua, xi. 19, 20, that none of the seven cities of Canaan made peace, for God had hardened their hearts that they might have no favour; wherefore

eo violato postea pœnæ sumtæ sint gravissimæ Deo auctore.  
<sup>2 Sam. xxi. 6.</sup>  
<sup>P</sup>Ambrosius hanc tractans historiam: *Josue tamen pacem quam dederat revocandam non censuit, quia firmata erat sacramenti religione, ne, dum alienam perfidiam arguit, suam fidem solveret.* Nihilominus doli sui pœnam aliquam sustinuerunt Gabaonitæ, jam sua deditio[n]e subditi facti Hebreworum. Addicti enim sunt <sup>q</sup>personal[i] cuidam servituti, cum si egissent aperte, potuissent ad tributariam conditionem recipi.

V. Non tamen ultra receptum loquendi morem extendenda est juramenti significatio. Ideo perjuri non erant qui cum <sup>4</sup>jurassent non datus se in matrimonium filias Benjaminitis, raptas cum raptoribus vivere permiserunt. <sup>1</sup>Aliud enim est dare, aliud amissum non repetere. Ambrosius de hoc <sup>De off. iii.</sup> <sub>14</sub> facto: *Quæ indulgentia congruo intemperantie supplicio non videtur vacare, quando illis hoc solum permisum est ut raptu inirent conjugia, non connubii sacramento.* Non dissimile est quod Achæi, Romanis quædam non probantibus

fuisset. At vero et hoc, et alia omnia *comminatoria Juramenta*, quum ex illis nemini jus queratur, et plerunque animo præira nou satis sui compote fiant, nullam aliam obligationem, nisi seriae penitentiae, post se trahunt. Vide quæ scripsimus in dictum caput PUFENDORFII nostri, § 13. *J. B.*

<sup>1</sup> Aliud est dare, aliud amissum non repetere] Οὐτε προτρέπομένων, οὐτε

κωλυόντων, ait in hac historia Josephus (*Antiq. Jud.* v. 2. § 12. *Edit. Huds.*) *Nec hortabantur Israëlitæ, nec prohibebant.* Seneca Excerptorum vi. 2. *Lex eum tenet qui juvat exulem, non qui patiatur juvari.* Symmachus: *Inanem metum divino animo vestro tentat incutere, si quis asserit conscientiam vos habere præbentium, nisi detrahentium subieritis invidiam.* (*Lib. x. Ep. 54.*)

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it is probable that if the Gibeonites had stated the actual fact, they would have obtained their lives on condition of submission; the oath therefore was good. So much so, that God inflicted heavy punishment for the violation of it. 2 Sam. xxi. 6. So Ambrose maintains this oath. And the Gibeonites were punished for their deceit with personal servitude, whereas, if they had acted openly, they might have escaped on condition of paying a tribute.

V. But the signification of an oath is not to be extended beyond the received usage of speech. Therefore those were not perjured, Judges xxi. 7, who, when they had sworn that they would not give their daughters to wife to the tribe of Benjamin, still permitted them to live with those who had taken them by violence. For it is one thing to give, another, not to ask back rigorously. So Ambrose. Not dissimilarly the Achæans, when the Romans were dissatisfied with something which they had done and sworn to, requested the Romans

*quaæ ab ipsis facta et jurejurando firmata erant, rogarunt ut ipsi Romani quaæ viderentur mutarent, nec Achæos religione obstringerent irrita ea quaæ jurejurando sanxissent faciendi.*

VI. Ut valeat juramentum, <sup>37.</sup> oportet obligatio sit licita. Quare nullas vires habebit jurata promissio de re illicita, aut naturaliter, aut divina interdictione, aut etiam humana, de qua mox agemus. Bene <sup>1</sup>Philo Judæus: ἵστω δὲ πᾶς ἐνωμότως ἄδικα δρῶν, ὅτι εὐορκήσει μὲν οὐ, τὸν δὲ πολλῆς φυλακῆς καὶ ἐπιμελείας ἀξιον ὄρκον ἀνατρέπει, φ τὰ καλὰ καὶ δίκαια ἐπισφραγίζεται. προστίθεται γάρ ὑπαίτια ὑπαιτίοις, ἐν οὐ δέοντι γινομένοις ὄρκοις, οὐδὲ πολὺ βέλτιον ἦν ησυχάζεσθαι, πράξεις παρανόμους. ἀπεχόμενος οὖν τοῦ ἄδικοπραγεῖν, ποτνιάσθω τὸν Θεὸν ἵνα μεταδῷ τῆς ἔλεως δυνάμεως αὐτῷ συγγενούς, ἐφ' οὓς ἀβουλίᾳ χρησάμενος ὥμοσε. διπλάσια γάρ αἱρεῖσθαι κακὰ, δυνάμενον τὴν ἡμίσειαν αὐτῶν ἀποφορτίσασθαι, μανία καὶ φρενοβλάβεια δυσιατος. Sciat quisquis obligatum in iusti aliquid molitur agere, non se jurisjurandi observantem fore, sed potius eversorem jurisjurandi, quod magna cura ac religione dignum est, et quo honesta ac recta sanciri solent. Addit enim culpam culpo, juramento non recte facto, et quo abstinere satius fuerat actum illegitimum. Quare ab injusta actione abstinenſ Deum veneretur, ut quæ ipsi est maxime propria, misericordiam [et temerarii juramenti veniam] ei impertiat. Nam dupla eligere mala, cum parte altera exonerari possis, insanabilis est furor, et mentis inopia. Exemplum dari potest in Davide, qui Nabali pepercit quem se occisurum juraverat. Cicero simile ponit exemplum in voto Agamemnonis, Dionysius Halicarnassensis

<sup>1</sup> Sam. xxv.

Lib. xi. 11.

<sup>• Oportet obligatio sit licita]</sup> Tractat hoc bene Ambrosius *de Offic.* i. et alii relati in cause *xxii.* questionem *iv.* Pertinet huc canon *vii.* concilii Hilerden-sis relati in tomum *iii.* conciliorum Gal-liarum; et in Hinckmari opusculis non pauca.

<sup>† Philo]</sup> *De specialibus Legibus*, (pag. 771. Edit. Paris.)

<sup>• Augustinus]</sup> *De Bono Conjugali* c. 4. citatur dicta quæstione. (cap. 20.) Vide et Gaium, *de Pace Publica*, Lib. i. c. iv. § 16. et *de Alboino Historiam*,

to change it themselves, and not to ask them to make void what they had sworn to uphold.

VI. That an oath may be valid, the obligation must be lawful. Wherefore there is no force in a sworn promise concerning a thing unlawful, either by Natural Law, or Divine Prohibition, or Human, of which we shall speak afterwards. So Philo Judæus. Thus David spared Nabal, whom he had sworn to kill. Cicero mentions, as an example, Agamemnon's vow; Dionysius, the conspiracy of the de-

in conjuratione decemvirorum de republica occupanda. Seneca : *Herc. Oct.*  
v. 480.

Præstare fateor posse me tacitam fidem,  
Si scelere careat: interim scelus est fides.

Ubi interim valet interdum. Ambrosius : *est enim contra officia i.e. ill.*  
*oficium nonnunquam solvere promissum, sacramentum custodire.* <sup>1</sup>Augustinus : *si ad peccatum admittendum fides exhibeat, mirum est si fides appellatur.* Idem docet se-  
cunda ad Amphilochium Basilius.

VII. 1 Imo etiamsi res quæ promittitur non sit illicita, sed <sup>2</sup>majus bonum morale impediens, sic quoque non valebit jusjurandum : quia scilicet profectum in bono Deo debemus, ita ut ejus libertatem eripere nobis ipsis non valeamus. Huc pertinet insignis ejus quem dixi Philonis Judæi locus, quem adscribere non pigebit: *εἰσὶ δὲ οἱ τὴν φύσιν ἀμικτοὶ καὶ ἀκοινωνητοὶ διὰ ὑπερβολὴν μισανθρωπίας γεγονότες, η̄ καὶ ὑπὸ ὄργῆς οὐαὶ χαλεπῆς δεσποίνης ἐκβιασθέντες, ὅρκῳ τὴν ἀγριότητα πιστοῦνται τῶν ήθῶν, οἵτινες οὐ φασιν ὁμοτράπεζον η̄ ὁμόροφον ἔχειν τὸν δεῖνα, η̄ πάλιν τῷ δεῖνι μὴ παρέχειν ὠφέλειάν τινα η̄ παρ' ἐκείνου τινὰ λήψεσθαι, καὶ μέχρι τελευτῆς sunt quidam adeo duro atque insociabili ingenio, sive odio humani generis, sive dura domina iracundia subacti, ut morum feritatem jurejurando obfirment, ut ne hunc habeant mensæ aut tecti socium, ne illi bene unquam faciant, ne quid ab eo ad mortem usque accipiант. Quod ait jurasse quosdam <sup>3</sup>ne huic vel illi unquam bene facerent, id Hebræi vocabant נור דגאה, id est, εὐχὴν ὠφελεῖας, vocem de beneficentia: שבע להטב Lev. v. 6. Hujus formula tradentibus Hebræorum magistris erat קרבן שאתא נהנה ל', קרבן כל מה דתנה מני,*

apud Paulum Warnefredi, Lib. II. c. 27.

<sup>1</sup> Majus bonum morale impediens] Quale Honorii de Pace nunquam facienda cum Alarico, Zozimo narrante, (Lib. v. cap. 49. Ed. Cellar.) Vide c. inter cetera 22. dicta jam quæstione, et concilium Hilderense in tomo III. con-

ciliorum Galliæ canone 7. Hincmarum quoque dicto opusculo ad interrogacionem xiv. libro de divortio ad interrogationem vi. et xiv.

<sup>2</sup> Ne huic vel illi unquam bene facerent] Vide Baba Kama, cap. ix. § 10. et ibi notata a doctissimo Constantino.

cemvirs. So Seneca, Ambrose, Augustine, Basil.

VII. 1 Even if the thing promised be not unlawful, but something impeding a greater moral good, the oath will not be valid: because we are bound by God to aim at a moral progress; so that we may not take this liberty for ourselves. So Philo Judæus, of persons who in anger, &c. swear that they will not change their minds, or do good to this or that man. The forms of such oaths occur in Hebrew. [See.]

cui convenit illa Syriaca in veteri versione Matthæi xv. 5. קָרְבָּנִי מֹתֵד רַתְהָנָא מַנִּי : græce δῶρον, ὁ ἐάν εἴξ ἔμοῦ ὥφεληθῆς, id est, *donum Deo dicatum sit*, (id enim est קָרְבָּן κορβᾶν) *si quid unquam a me boni acceperis.*

2 Votum, addita consecrationis poena, validum plane censabant Hebræorum magistri, pessimi hac in parte juris divini interpretes, etiamsi adversus parentes factum esset: quod dicto loco refellit Christus, in cuius verbis τιμᾶν honorare est benefacere, ut collato Marci loco appareat; et Pauli 1 Tim. v. 3, 17, et Num. xxiv. 11. Sed etiamsi adversus alios conceptum sit, recte dicemus non obligare jurandum, quia, ut diximus, profectui adversum est.

*Thom. 2. 2.  
22. art. 7, et  
ibid. Cajeſ.  
Graſ. c. ult.  
§ ult. c. 22.  
q. 4.  
Soto. vii. q. 1.  
art. 3. eſc. 2.*

VIII. De impossibilibus dicere nihil attinet. Satis enim manifestum est ad omnino impossibile neminem obligari.

IX. De eo vero quod pro tempore aut ex suppositione est impossible, in pendenti esse obligationem, ita ut is qui ex suppositione juravit, operam quam potest dare debeat, ut quod juravit possibile reddat.

X. Forma jurisjurandi verbis differt, re convenit. Hunc enim sensum habere debet, ut Deus invocetur, puta hoc modo: *Deus testis sit*, aut, *Deus sit vindex*, quæ duo in idem recidunt. Nam cum superior puniendi jus habens <sup>\*</sup>testis advocatur, simul ab eo perfidæ ultio poscitur: et qui scit omnia

\* *Testis advocatur, simul ab eo perfidæ ultio exposcitur]* Ambrosius ad Valentianum Imperatorem, (Lib. v. Epist. 30) *quid est jurare, nisi ejus quem testare fidei tuae præsumem, divinam potentiam confiteri?* vide formulam insig-nem Chagani Avarorum apud Menandrum excerptis legationum. (Cap. 21).

2 A vow of anything to God that another might not have it, was held valid by the Hebrew masters, even against parents; which Christ condemns. Even if the vow be against others it is not binding, because it is opposed to our moral progress.

VIII. Oaths concerning things impossible we need not speak of: for no one can be compelled to do what is impossible.

IX. As to what is for the time or by supposition impossible, the obligation is suspended; so that he who has sworn on the supposition, ought to do all that he can, that he may render possible what he has sworn.

X. The Forms of Oaths differ in words, agree in substance. They ought to have this meaning, that God is called upon, suppose in this way: *May God be my witness;* or, *May God be my Judge;* which two forms come to the same thing. For when a superior, having the right of punishing, is called in as a witness, he is also called upon to

ultor est, ideo quia testis. Plutarchus: πᾶς ὄρκος εἰς κατάραν <sup>Quæst. Rom.</sup>  
<sup>44</sup> τελευτὴ τῆς ἐπιορκίας· omne jusjurandum in diras desinit,  
 si quis pejeraverit. Huc pertinent fœderum formulæ antiquæ,  
 quibus mos erat victimas adhiberi, ut appareat Gen. xv. 9, et  
 sequentibus. Ut illa Romana apud Livium: tu Jupiter ita <sup>Lib. i. 24.</sup>  
 illum ferito ut ego hunc porcum. Et alibi: Deos precatus <sup>Lib. xxi. 45.</sup>  
 ita se mactarent quemadmodum ipse agnum mactasset. Et  
 apud Polybium ac Festum: si sciens fallo, ita me Diespiter <sup>Hist. iii. 25.</sup>  
<sup>Voce Lapis.</sup> ejiciat ut ego hunc lapidem.

XI. 1 Sed et nominatis rebus personisve aliis jurari mos est vetus, sive quod illas sibi noxias imprecabantur, ut solem, terram, cœlum, principem, sive quod in illis puniri deposcebant, ut in capite, in liberis, in patria, in principe. Neque profanarum tantum gentium his mos, sed et Judæorum, ut idem ille <sup>a</sup> Philo nos docet. Ait enim non debere juraturos ob rem quamvis statim ἐπὶ τὸν ποιητὴν καὶ πατέρα τῶν δῶν ἀνατρέχειν, ad rerum omnium auctorem ac parentem procurrere, sed jurare per parentes, cœlum, terram, universum: cui simile est quod Homeri interpres notant, Græcos illos <sup>Eustath. ad Iliad. i. v.</sup> veteres non solitos προπετῶς κατὰ τῶν Θεῶν ὄμνύειν, ἀλλὰ <sup>234</sup> κατὰ τῶν προστυγχανόντων, facile per Deos jurare, sed <sup>b</sup> per res alias præsentes: ut per sceptrum, idque ipsum a justissimo rege Rhadamantho fuisse constitutum tradit Porphyrius, <sup>De Abel. iii. p. 283.</sup>

<sup>a</sup> Philo] Despecialibus legibus, (pag. 770 A. B.)

<sup>b</sup> Per res alias] De Socrate Apollonius apud Philostratum vi: ὥμνυ ταῦ-

τα, οὐχ' εἰς θεοὺς, ἀλλ' ἵνα μὴ θεοὺς ὥμνυ. Jurabat per ista, non ut per Deos,

sed ne per Deos juraret (c. 19.)

punish perfidy: and He who knows all things is the Avenger, because he is the Witness. Plutarch says every Oath ends in imprecations on the false swearer. To this view belonged the ancient forms of leagues, in which victims were slain: of which see the meaning in the passages quoted. So Abram's sacrifice, Gen. xv. 9.

XI. 1 But it is also an old custom to swear, mentioning other things or persons, either as imprecating harm from them, as the sun, the earth, heaven, the prince; or as calling to be punished in them, as one's head, children, country, prince. And this was done not only by the heathen, but by the Jews; as Philo shews. He says that those who are going to swear, ought not forthwith to go up to the Creator and Father of all, but to swear by parents, heaven, earth, the universe. And so Eustathius notes that the ancient Greeks did not commonly swear by the Gods, but by other things present; as by the sceptre; and this was instituted by Rhadamanthus. [See.] So Joseph swore

*In Aves, v.* et ad Aristophanem Scholiastes. Sic Josephus per salutem Pharaonis jurasse legitur, ex more apud Ægyptios recepto, *Gen. xlii. 15.* quem ibi notat Abenesdras; <sup>2 Reg. ii. 2.</sup> *Elisæus per vitam Eliæ.* Neque vero Christus Matthæi v. ut quidam existimant, hæc juramenta vult minus esse licita quam quæ expresso Dei nomine flunt: sed cum Hebræi ea minus curarent, opinione quadam non dissimili illius qui dixit, <sup>5</sup> *Sceptrum non putat esse Deos,* ostendit et hæc esse vera juramenta. Nam et Ulpianus optime dixit: *Qui per salutem suam jurat, Deum jurare videtur, respectu enim divini Numinis jurat.* Sic Christus ostendit eum qui templum jurat, Deum jurare qui templo præsidet; et qui cœlum, Deum qui cœlo velut insidet.

*L. 33. D. de Jur. Jur.*

*Matth. xxii. 21.*

*Lib. i. pp. 1046, 1047.  
§ 22. p. 453.*

2 At Hebræi magistri istorum temporum existimabant, non obstringi homines juramentis per res conditas factis, nisi adjecta pena, ut si res, de qua jurabatur, Deo consecraretur. Hoc enim est juramentum κορβᾶν, sive ἐν τῷ δώρῳ, cuius non dicto tantum Matthæi loco, sed in Tyriorum quoque legibus mentio exstebat, ut ex Josephi contra Appionem disputatione

<sup>c</sup> *Elisæus per vitam Eliæ]* Adde ii. Regum iv. 30. Cant. ii. 7.

<sup>d</sup> Ovidii est, *Remed. Amor.* vers. 784. *J. B.*

<sup>d</sup> *Respectu enim divini Numinis jurat]* Ita et Gratianus causa xxxii. questione 1.

<sup>e</sup> Verisimilis non videtur mihi illa etymologia. Neque enim sat noti erant Græcis veteres Judei, ut a nomine jura-menti apud hos usitati illi petere potue-

rint vocem, qua uterentur ad omnes Orientis populos designandos: et longe ante tempus juramenti illius introducti, vox Καρβάνοι in usu erat, quum reperiatur apud Æschylum, ab Auctore ipso laudatum. In Euripide tamen, quem idem indicat, non reperio: neque illam notavit in Indice suo Barnesius, ceteroquin diligentissimus. Videtur Auctor cum isto Poeta confusisse alium recentiorem, cuius locus adfertur in Lexicis, Lyco-

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by the life of Pharaoh, following the Egyptian custom; and Elisha to Elijah, *As thy soul liveth*, 2 Kings ii. 2.

And Christ, in Matth. v., does not, as some suppose, teach that these oaths are less lawful than those in which God's name is expressed, but that they were true oaths, though the Hebrews thought more lightly of them. As Ulpian says, that he who swears by his own salvation, swears by God; so Christ taught that he who swears by the temple, or by heaven, swears by God.

2 The Hebrew teachers of that time held that men were not bound in oaths in which they had sworn by created things, except the thing sworn by, were, as a penalty, vowed to God. This is the oath of *Corban*, which is not only mentioned in Matthew, but also was known to the Tyrians, as we learn from Josephus against Appion. And hence I suppose the oriental peoples were called *Karbani*, as in *Æschylus*

discimus : nec aliunde arbitrer Orientis populos <sup>6</sup> dictos Græcis καρβάνους, quæ vox apud Aeschylum et Euripidem exstat : καρβάνα δ' αὐδὰν, apud eundem Aeschylum. Huic errori dicto loco Christus occurrit. Christianos veteres Tertullianus *Apolog. c. 32* jurasse ait per salutem principis omnibus geniis augustiorem. Apud Vegetium formula est, cuius et supra meminimus, qua *Lib. II. 5.* Christiani milites jurant non per Deum tantum, sed et per majestatem Imperatoris, quæ secundum Deum humano generi diligenda est et colenda.

XII. Sed et <sup>7</sup> si quis per falsos Deos juraverit, obligabitur : quia quanquam sub falsis notis generali tamen complexione numen intuetur : ideoque Deus verus, si pejeratum sit, in suam injuriam id factum interpretatur. Et sanctos viros videmus non detulisse quidem unquam sub ea forma jurandum, multo minus ita jurasse, quod a Duarenō <sup>7</sup> permitti miror ; sed tamen si quibuscum negotium erat adduci non possent, ut aliter jurarent, contraxisse cum eis, ipso quidem ut oportebat jurantes, ab illis autem juramentum accipientes

phronem dico. *J. B.*

<sup>8</sup> Si quis per falsos Deos juraverit, obligabitur] Liber Sapientiae c. xiv. où γάρ ή τῶν δομνυμένων δύναμις, δλλ' ή τῶν ἀμαρτανόντων δίκη ἐπεξέρχεται δει τὴν τῶν ἀδίκων παράβασιν. Quod ita verit Latinus : Non enim juratorum virtus, sed peccantium pena perambulat semper injustorum pravaricationem, (vers. ult.)

<sup>7</sup> Non id permittit Duarenus, sed tantum deferri juramentum illi, qui per Mahumetem, e. g. juraturus est. Vide JCtum illum, Tract. priore ad Tit. *De jurejurando*, cap. xi. Tom. I. Opp. Ed. Lugd. 1579. p. 235. et Tract. altero, cap. 4. pag. ii. Tom. II. Adde que notavimus in sapientius laudatum Caput PUFENDORFI, *De Jure Nat. et Gent.* § 4. Not. 2. Edit. secundæ. *J. B.*

and Euripides\*. Christ refutes this error.

Tertullian says that the ancient Christians swore by the Safety of the Prince. In Vegetius, as above stated, the formula is, By God and the Majesty of the Emperor, which, after God, is to be reverenced and honoured by men.

XII. Moreover he who swears by false gods is bound; because, though under false notions, he refers to the general idea of Godhead: and therefore the true God will interpret it as a wrong to himself if perjury be committed. We do not find that holy men ever proposed an oath in that way, much less that they swore such an oath, which I wonder that Duarenus permits†. But if those with whom they were

\* Barbeyrac says, not in Euripides, but in Lycophron; and he questions the etymology of *Korbani*.

† Duarenus does not permit men to swear, but only to accept an oath by *Makomet*. *J. B.*

tum congruat verbis, quod idem appellat *εὐορκεῖν*. Qui in illo peccat <sup>1</sup>*ψευδορκεῖν*, qui in hoc *ἐπιορκεῖν* eidem Chrysippo dicitur satis distinete, quanquam confundi interdum hæc solent.

XIV. Et si quidem materia talis sit, et verba ita concepta, ut non ad Deum tantum sed et ad hominem referantur, jus haud dubie homini ex ipso juramento queretur, tanquam ex promisso aut contractu qui simplicissime intelligi debeat. Si vero aut verba hominem non respiciant jus ei conferendo, aut respiciant quidem, sed aliquid sit quod ei possit opponi, <sup>2</sup>tunc ea vis erit jurisjurandi, ut homo quidem ille jus nullum consequatur, at nihilominus qui juravit Deo obligetur stare jurejurando. Hujus rei exemplum est <sup>3</sup>in eo qui per metum injustum causam promissioni juratæ dedit. Nam hic jus nullum consequitur, aut tale quod reddere debeat, quia causam damno dedit. Sic videmus Hebræos reges et <sup>4</sup>a prophetis Ezecl. xvii. 12, 13, 16. increpatos, et punitos a Deo, quod fidem juratam Babyloniis regibus non servassent. Laudat Cicero Pomponium tribunum qui servavit quod terrore coactus juraverat: *tantum*, inquit, <sup>Offic. III. 31.</sup> *Tolet. IV. 22.* <sup>Offic. III. 2.</sup> *temporibus illis iusjurandum valebat*. Quare non Regulus tantum redire in carcerem, ut maxime is fuerit injustus,

adfirmandam fidem promissorum. Adeo que ubi obligatio nulla est, tota vis jurisjurandi cadit. Vide que contra duplicitem illam obligationem, quam Auctor sibi ~~fingit~~, post PUFENDORFUM, diximus, Capite jam sèpius laudato. Nonnulla etiam hac de re addidimus in Notis nostris Gallicis ad hunc locum.

## J. B.

<sup>1</sup> *In eo qui per metum injustum causam promissioni juratæ dedit*] Etiam vi extortum iusjurandum, ob Dei reverentiam servandum docet Augustinus epistolis CCXXIV. et CCXXV.

<sup>2</sup> *A prophetis increpatos*] Vide et Jerem. xxxix. 5.

they refer not to God only but to a man also, [as if I swear to give you a thing,] then, undoubtedly, the man acquires a right by the oath, as from a promise or contract simply. But if the words do not regard a man as conferring on him a right, or regard him, but have something opposed to them; then the effect of the oath will be that the man will acquire no right; but he who has sworn to God will be obliged to stand by his oath. This is exemplified when one, by inspiring unjust fear, has given occasion to a sworn promise. So we see the Hebrew kings rebuked by the prophets, and punished by God, for not keeping their faith with the Babylonian kings. Cicero lauds Pomponius, who kept an oath given under terror: such, he says, was the force of an oath at that time. And hence Regulus was bound to return to his imprisonment, though unjust; and those ten whom Cicero mentions, to return to Annibal.

debuit; sed et decem illi quorum Cicero meminit, redire ad Annibalem: *jusjurandum enim intercesserat.*

XV. 1 Neque hæc tantum inter hostes publicos locum habent, sed inter quosvis: non enim persona sola respicitur cui juratur, sed <sup>1</sup>is qui juratur Deus, qui ad obligationem parviendam sufficit. Repudiandus ergo Cicero cum ait perjurium nullum esse, si prædonibus pactum pro capite pretium non adferatur, ne si juratum quidem sit: quia pirata non sit ex perduellium numero definitus, sed communis hostis omnium, cum quo nec fides esse debeat, nec *jusjurandum* commune. Quod et de tyranno dictum ab eodem est alibi, et a Bruto apud Appianum: *οὐδὲν πιστόν ἔστι Πωμαῖος πρὸς τυπάννους, οὐδὲ εὑρκον, cum tyranno Romanis nulla fides, nulla jurisjurandi religio.*

2 Atqui sicut in jure gentium constituto differre hostem a pirata verum est, et a nobis infra ostendetur; ita hic ea differentia locum habere non potest, <sup>2</sup>ubi, etsi personæ *jus deficiat*, cum Deo negotium est: qua de causa juramentum voti <sup>3</sup>nomine nuncupatur. Neque id, quod sumit Cicero, verum est, nullam esse cum prædone *juris societatem*. Nam

<sup>1</sup> *Is qui juratur Deus]* Nicephor. Gregoras: *εἰς θεὸν ή ἐπιφερία τὸ τὴν περιφρονήσεως ανατίθησιν ὑγκλημα· perjurium Deo culpam impingit negligenter.* (Lib. x. pag. 227. Ed. Col. 1616.)

<sup>2</sup> *Ubi etsi personæ jus deficiat, cum*

*Deo negotium est]* Plutarchus Lysandro: *δὲ ὄρκῳ παρακρούμενος, τὸν μὲν ἔχοντα ύμολογεῖ δεδέναι, τοῦ δὲ Θεοῦ καταφρονεῖν· qui juramento hostem circumvenit, is ostendit a se hostem metui, Deum contemni.* (Pag. 437 c.)

<sup>3</sup> *Improprie ita dicitur. Votum fit*

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XV. 1 And this is not only true between public enemies, but any parties: for respect is not had to the person to whom the oath is made, but to God by whom we swear; and this is sufficient to produce an obligation. Therefore Cicero is to be repudiated when he says that it is no perjury if we do not pay the price which we have promised to robbers for sparing our life, not even if we have sworn: because a robber is not an open enemy, having the rights of war, but a common enemy of all men: which also the same Cicero says elsewhere of tyrants, as does Brutus in Appian.

2 But though, in the Instituted Law of Nations, it is true that an enemy differs from a robber, as we shall shew below; yet this difference cannot have place when, though the right of the person fail, our business is with God: on which account an oath is called a *vow*. Nor is that true which Cicero assumes, that we have no common ground of rights with robbers: for that a deposit is to be restored when made by a robber, if the owner do not appear, is rightly ruled by Tryphonius.

Thom. 2. 2.  
ib. art. 7. et  
ib. Cajet.  
Alex. Inol.  
in c. Ver. de  
Jurejur.  
Soto, VIII. q.  
I. art. 7.  
De Offic. III.  
29.

Civill. II. p.  
61a.

depositum ex ipso gentium jure <sup>n</sup>reddendum latroni, si dominus non appareat, recte a Tryphonino responsum est.

L. Sl. D.  
Deposit.

3 Quare probare non possum quod a quibusdam est traditum, eum qui prædoni quicquam promiserit, momentanea solutione posse defungi, ita ut liceat ei quod solvit recuperare. Verba enim in juramento quoad Deum simplicissime atque adeo cum effectu sunt intelligenda. Atque ideo qui rediuit ad hostem clam, iterumque abiit, non satisfecit juramento de redditu, ut recte a senatu Romano judicatum est.

XVI. 1 Illud vero Accianum :

Apud Cicer.  
Off. ill. 28.

T. Fregisti fidem.

A. Quam neque dedi, neque do infideli cuiquam :

Ita demum probari potest, si jurata promissio aperte respectum habuerit alterius promissionis, <sup>o</sup>quæ ei quasi conditio fuerit implicita, non si diversi generis sint promissa, et <sup>L. Siquis, 39.</sup> citra respectum mutuum : tunc enim omnino servandum cuique erit <sup>in fine. D.</sup> de Jurejur. quod ipse juravit. Atque hoc nomine Regulum laudans sic compellat Silius (Lib. vi. vers. 63, 64) :

Qui, longum semper fama gliscente per ævum,  
Infidis servasse fidem memorabero Pœnis.

*Deo: JURAMENTUM, per Deum, ait ipse Auctor, Adnot. in Numer. xxx. 3. Confer PUFENDORF. De Jure Nat. et Gent. Lib. iv. cap. 2. § 8.*

<sup>n</sup> Redendum latroni] Et ei qui regnum sine jure invasit, quomodo Orovanni depositum redditum a Prienens-

sibus. Polybius (*Excerpt. de Virt. et Vit.* p. 1470. *Ed. Amst.*) et Diodorus Siculus in excerptis Peiresianis, (p. 334.)

<sup>o</sup> Quæ ei quasi conditio fuerit implicita] C. pervenit, quod est III. de Jurejurando. Adde I. lege fundo, 5. in fine D. de lege commissoria.

3 Wherefore I cannot approve what is delivered by some writers, that he who has promised anything to a robber may discharge his duty by a momentary payment, and be allowed forthwith to take back what he has paid. For words used in an oath, and so, towards God, are to be understood with entire simplicity; and therefore, so as to have effect. And therefore, he who returned to the enemy clandestinely and came away again, did not satisfy his oath that he would return, as was rightly judged by the Roman Senate.

XVI. 1 Are oaths to a faithless person not to be kept: as Accius, quoted in Cicero's *Offices*, holds?

Not if the sworn promise had evidently respect to another promise which was a sort of implied condition. But they are to be kept, if the promises are of a diverse kind, and without mutual reference: for then each must observe what he has sworn. And thus Regulus is praised by Silius for keeping faith with the faithless.

2 Inæqualitatem in contractibus naturaliter locum facere aut rescindendi aut reformandi contractus, supra diximus. Et quanquam jus gentium aliquid in hac re mutavit, jure tamen civili, quod inter ejusdem populi partes valet, rediri sæpe ad illud quod natura licebat, itidem supra monuimus. Sed hic quoque, si juramentum intercessit, etiamsi personæ nihil aut minus debeat, Deo fides erit præstanda. Itaque Psalmorum scriptor, ubi viri boni virtutes enumerat, addit et hanc: *Juratus in damnum suum non tamen mutat*<sup>1</sup>.

XVII. Verum illud notandum est, quoties non personæ jus nascitur ex tali aliquo defectu, qualem diximus, sed Deo obstringitur fides, heredem ejus qui juravit non teneri. Quia ad heredem sicut bona transeunt, id est, quæ in hominum sunt commercio, ita bonorum onera: non item alia quæ quis ex officio puta pietatis, gratiæ, fidei debuit. Hæc enim ad illud quod stricte jus dicitur inter homines non pertinent: ut alibi quoque ostendere meminimus.

XVIII. Sed etiam ubi jus personæ non nascitur, si tamen juramentum utilitatem spectet alicujus, patque is eam

<sup>1</sup> Alio modo Auctor videtur vertere verba illa in Adnotationibus suis ad hunc Psalmum; quas videre poteris. Sed et sequendo versionem, qualis hec exhibetur, nil est, quod suadeat agi de illis Promissis jurejurando firmatis, in quibus reperitur læsio, propter quam nulla essent, si jusjurandum abasset. Diximus in Notis Gallicis ad hunc locum. *J. B.*

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2 That inequality in contracts, by Natural Law, gives ground either for rescinding or remodelling them, we have said above. And though the Law of Nations has changed something in this matter, we are often allowed by the Civil Law, which is of force over those who are parts of the same people, to return to the Natural Law. But here if an oath have been introduced, although nothing, or less than the contract, may be due to the person, our faith to God is to be kept. So Ps. xv. 4, *He that sweareth to his neighbour, and disappointeth him not, though it were to his own hinderance.*

XVII. But it is to be observed, that when there is no right of a person produced, in consequence of some of these defects, but only our faith engaged to God; the heir of the swearer is not bound. Because as the goods pass to the heir, that is, the things about which men deal, so do the burthens upon them: but not the obligations which any one was liable to, as duties of piety, kindness, or good faith. For these do not belong to what is strictly called *jus* or right, as we have shewn.

XVIII. So when a right is not acquired by a person, in virtue of another's oath, yet if the oath respect the utility of any one, and

nolit, non tenebitur qui juravit: <sup>4</sup>sicut nec tenebitur si cesseret qualitas sub qua alicui juravit, ut si magistratus desinat esse magistratus. Apud Cæsarem libro II. *de Bello Civili*, Curio <sup>cap. 32.</sup> Domitii qui fuerant milites sic alloquitur: *Sacramento quidem vos tenere qui potuit, quum projectis fascibus et deposito imperio privatus et captus ipse in alienam venisset potestatem?* Et mox sacramentum ait capitis deminutione sublatum.

XIX. Illud queritur, an quod contra juramentum fit, illicitum sit tantum, an et irritum? qua de re distinguendum arbitror, ut si sola fides sit obstricta, valeat actus contra juramentum factus, puta testamentum, venditio: non valeat autem si ita conceptum sit jusjurandum, ut simul contineat abdicationem plenam potestatis ad actum. Et hæc quidem naturaliter jusjurandum sequuntur: ex quibus faciendum est judicium de regum juramentis, et his quæ exteri exteris jurant, quando actus ex loco subjectionem non accepit.

XX. 1 <sup>r</sup>Nunc quid superiorum, id est, regum, patrum, dominorum, et maritorum in his quæ maritalis sunt juris,

<sup>p</sup> Aitque is eam nolit] Plautus *Rudente: Jurijurandi rogo gratiam facias.* (v. 8. 58.)

<sup>4</sup> Sic ut nec tenebitur si cesseret qualitas] Similia vide in L. si duas § gentium

D. de excusat. tut. et apud Galium II. obs. cxliv. n. 8. et de Arrestis x. 9. et apud Azorium institutionibus moralibus v. 22. q. 6. parte i.

<sup>r</sup> Nunc quid superiorum, id est, re-

c. Dilect. 25.  
de Præb.  
Covarr. in d.  
c. Quam. p. 2.  
f. 3. n. 10.

he will not have this utility, the swearer is not bound. Also he is not bound if the quality under which he swore has ceased. So in Cesar, Curio addresses those who had been Domitius's soldiers: *Who could hold you by an oath, when he himself, throwing away the ensigns of authority, and laying down his command, as a private man and a captive, has himself become subject to others?* And afterwards he says that their oath is rescinded by his degradation.

XIX. It is made a question whether that which is contrary to an oath is only unlawful, or also void.

For this we must distinguish: if good faith alone be engaged, an act done against the oath is valid; as a testament, a sale. But not, if the oath be so expressed that it contains at the same time a full abdication of power to do the act.

And these are the natural consequences of oaths; from which we must form a judgment of the oaths of kings, and the oaths which foreigners swear to foreigners, when the act is not necessarily subjected to the laws of the place.

XX. 1 Let us now consider what the authority of superiors, that is of kings, fathers, masters, husbands (in marital matters), can

imperia possint videamus. Superiorum actus hoc quidem efficere non potest, ut jusjurandum quatenus vere fuit obligatorium non sit præstandum : id enim juris est naturalis et divini. Sed quia actus nostri non plene sunt in nostra potestate, sed ita ut a superioribus dependeant, <sup>2</sup>ideo duplex esse potest actus superiorum circa id quod juratur, alter directus in personam jurantis, alter in personam cui juratur.

2 In personam jurantis dirigi potest, aut antequam juretur irritum reddendo juramentum, quatenus jus inferioris sub potestate superioris continetur, aut postquam juratum est vetando ne impleatur. Nam inferior, qua inferior, obstringere se non potuit nisi quatenus superiori id placitum esset : ampliorum enim non habebat potestatem. Hoc modo lege Hebræa mariti uxorum, patres liberorum qui sui juris nondum erant, juramenta irrita faciebant. Proponit hanc quæstionem Seneca : *Si lex lata erit, ne id quisquam faciat quod ego me amico meo facturum promiseram?* et solvit : *Eadem lex me defendit quæ vetat.* Sed et actus ex utroque mixtus esse potest, ut si superior constituat quod inferior juraverit

*gum, patrum, dominorum, et maritorum  
in his quæ maritalis sunt juris, imperia  
possint videamus]* Augustinus epistola  
CCXL. et CCXLI.

<sup>2</sup> Vide, præter § 24. dicti Capitis  
ii. Lib. iv. PUFENDORFI De Jure Nat.  
et Gent. ea, quæ observavimus ad libel-  
lum De Officio Hom. et Civis, Lib. i.

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do [in modifying the effect of oaths]. The act of a superior cannot effect that an oath, so far as it was obligatory, is not to be performed ; for that it is to be so, is a matter both of Natural and of Divine Law. But because our acts are not fully in our power, but in such a way that they depend on superiors, therefore there may be a double act of a superior as to the matter sworn ; one direct, on the person of the swearer, the other, on the person to whom the oath is made.

2 The act of the superior may be directed on the person of the swearer, either before swearing, rendering the oath void, in so far as the right of the inferior is subject to the superior ; or after the swearing, forbidding that it be fulfilled. For the inferior, as inferior, was not able to bind himself except so far as it should please his superior ; he had no further power. And thus by the Hebrew Law the husband might make void the vows of his wife. Seneca proposes this question : *If a law be made that no one shall do what I had promised my friend I would do, what then?* And he solves it, saying, The same law which forbids me defends me. But there may be a mixed act of both parties ; as if the superior should direct that what the inferior shall swear in this or that case, say from fear or from weakness of judgment, shall be valid, only if he himself approves

hoc aut illo casu, puta ex metu, aut imbecillitate judicii, ita demum valere si ab ipso approbetur. Atqui ex hoc fundamento defendi possunt absolutiones juramentorum, quæ<sup>\*</sup> olim a principibus, nunc ipsorum principum voluntate, quo magis cautum sit pietati, ab ecclesiæ præsidibus exercentur.

*L. ult. ad  
mun. Molin.  
disp. 149. c.  
si vero. de  
Jurjur.*

3 In personam ejus cui juratur actus dirigi potest tollendo ab eo jus quod ei partum est; aut etiam, si jus desit, vetando ne quid ex tali juramento accipiat: idque duobus modis, sive in poenam, sive ob publicam utilitatem, ex vi supereminentis dominii. Atque hinc intelligi potest, si jurans non ejusdem sit ditionis cum eo cui juratur, quid aut hujus aut illius rectores possint circa jusjurandum. Ipse autem qui juratus aliquid promisit nocenti qua talis est, puta piratæ, non potest jus promisso quæsitum poenæ nomine ob id ipsum ei auferre: quia tunc verba nullum haberent effectum, quod omnino vitandum est. Similique de causa compensari non poterit quod promissum est, cum jure quod ante erat controversum, si post motam controversiam inita pactio fuerit.

4 Potest et lex humana impedimentum quod certi gene-

cap. xi. § 6. not. 3. tertias et quartas Editionis. *J. B.*

\* *Olim a principibus*] Suetonius *Tiberio* 35. Sic et in Hispania diu usur-

patum notat Ferdinandus Vasquius *de Success. Creat.* l. II. § 18. [Apud Vasquium nil tale reperio, nec in loco indicato, nec alibi. *J. B.*]

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of it. And on this ground may be defended the absolutions from oaths which were formerly granted by princes; and are now, by the consent of princes, for the sake of piety, granted by the governors of the Church.

3 The act of the superior may be directed on the person of him to whom the oath is made, by taking from him the right which he has thus acquired: or even, if he have no right, by forbidding that he receive anything in virtue of such oath: and that, in two ways, either as a penalty, or for public utility, in virtue of his Eminent Dominion. And hence it may be understood, if the swearer be not under the same subjection as the person sworn to, what the governor of each may do in respect to the oath.

\* He who on oath has promised anything to a mischievous person, as such, as for instance a robber, cannot take from him the promised right on the ground of penalty: for then his words would have no effect, which is by all means to be avoided.

In like manner what is promised cannot be given as a compensation for a right which was in controversy before, if the agreement took place after the controversy began.

\* These two rules refer to promises rather than oaths. W.

ris actibus posuerat, tollere, si juramentum aut qualemque, aut certa forma accesserit: quod Romanæ leges fecerunt in iis impedimentis, quæ non directe publicam, sed privatam jurantis utilitatem spectant. Quod si fiat, valebit actus juratus eo modo quo naturaliter citra legem humanam fuerat valitus, aut fidem tantum obstringendo, aut jus etiam dando alteri, pro diversa actuum natura, quæ alibi a nobis explicata est.

XXI. 1 Notandum hic est obiter, quod in Christi præceptis et apud Jacobum de non jurando dicitur, proprie non ad assertorium juramentum, <sup>t</sup>cujus apud Paulum Apostolum exempla exstant aliquot, sed ad promissorium futuri incerti pertinere. Ostendit hoc evidenter oppositio illa in verbis Christi: *audistis dictum antiquis, non pejerabis, sed reddes Domino juramentum. Ego vero dico vobis, Ne jurate omnino.* Et ratio quam Jacobus adjicit: *μὴ εἰς ὑπόκρισιν πέσητε*, id est, *ne fallaces inveniamini*: nam eum sensum vox ὑποκρίσεως apud Hellenistas habet, ut appareat Job. xxxiv. 30; Matth. xxiv. 51, et alibi.

*Matt. v. 33.  
Ep. v. 12.*

2 Idem evincit illud in Christi verbis, *ἔστω δὲ λόγος ὑμῶν, ναὶ ναὶ, οὐ οὐ*, quod sic Jacobus explicat, *ἡτα δὲ ὑμῶν τὸ ναὶ ναὶ, καὶ τὸ οὐ οὐ*. ubi manifeste est figura quam πλοκῆν rhetores vocant, ut in illo:

*Virg. Eccl. vii. 70.*

Ex illo Corydon Corydon est tempore nobis.

*Ex Aquill.  
Rom. Antiq.  
Rheb. Lat.  
P. 19.*

Et in altero simili: *ad illum diem Memmius erat Memmius.*

<sup>t</sup> *Cujus apud Paulum Apostolum exempla exstant aliquot] Rom. i. 9; ix. 1; ii. Corinth. i. 23; xi. 31; Phil. i. 8; i. Thess. ii. 5; i. Tim. ii. 7.* <sup>8</sup> *Vide L. 39. § 1. D. De Legat. III. L. 1. § 2. De Verb. Obligat. J. B.*

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4 Human Law may take away the impediment which it had thrown in the way of certain acts, if an oath, either in general, or in a particular form, be introduced: which the Roman Law did in the case of those impediments which regard, not directly public utility, but the private utility of the swearing. And if this be done, the act so sworn will be valid in the same manner as it would, without the Human Law, have been valid by Natural Law; either only by binding good faith, or by giving a right to another, according to the different nature of such acts, as already explained.

XXL 1 It is here to be noted in passing, that what is said in the precepts of Christ, and in St James, of not swearing, does not properly apply to an oath of assertion, of which there are some examples in St Paul himself, but to an oath of promise with regard to an uncer-

Nam prius *vai* et *ou* promissum significat, posterius ejus implementum. Est enim *vai* promittentis: unde per ἀμῆν explicatur Apoc. i. 7, eundemque sensum habet quod hic in Syriaco est, ḥn respondens Rabbinico ḥn et Arabicum *عَنْ*, quomodo apud jurisconsultos Romanos μάλιστα<sup>3</sup>, et quidni? notæ sunt respondentis ad stipulationem. Pro implemento promissionis sumitur apud Paulum 2 Corinth. i. 20, cum ait omnia Dei promissa in Christo esse *vai kai amēn*. Hinc vetus Hebræorum dictum, *\*justi hominis vai est vai, et non est non.*

3 Contra, quorum facta a dictis discrepant, apud eos esse dicitur *vai kai ou*, 2 Corinth. i. 18, 19, id est, *vai* eorum esse *ou*, et *ou* esse *vai*. Sic Paulus Apostolus ipse exponit: nam cum negasset se ἐλαθρίᾳ χρήσασθαι, levitate usum, addit sermonem suum non fuisse *vai kai ou*. Festus varias referens sententias de significatione vocis *naucum*, sic scribit: *quidam (aiunt) ex græco "vai kai ouχi levem hominem significari.* Quod si *vai kai ou* levitatem significat, sequitur, *vai vai, ou ou*, constantiam significet.

4 Idem ergo dicit Christus quod <sup>x</sup>Philo: κάλλιστον καὶ <sup>De Decal.</sup><sub>p. 736 c.</sub> βιωφελέστατον καὶ ἀρμόττον λογικῇ φύσει τὸ ἀγώμοτον, οὗτος ἀληθεύειν ἐφ' ἐκάστου δεδιδαγμένη, ὡς τοὺς λόγους ὄρκους εἶναι νομίζεσθαι. Optimum atque utilissimum et rationali naturæ convenientissimum est juramento abs-

\* Reperitur apud Buxtorfium, *Flo-*  
*rileg. pag. 329. J. B.*

▪ *Nai kai ouχi*] Recte in hoc Festi  
loco scripteris *ouki*, ut sepe apud Ho-

merum: id enim ad vocem nauci pro-  
pius accedit.

<sup>x</sup> *Philo*] De decalogo.

tain future. This plainly appears in the words of Christ, Matth. v: and in the reason which St James adds, v. 12, *lest ye fall into condemnation, ἵπκρισιν, is, lest ye be found fullacious.* See the passages.

2 The same is proved by the words of Christ, *Let your words be yea, yea, and nay, nay:* which St James explains, *Let your yea be yea, and your nay, nay:* that is, let your *yea* mean a sincere consent, and your *nay* a resolute refusal. See the illustrations.

3 On the contrary, those whose acts are at variance with their words are those whose word is *yea and nay*, 1 Cor. i. 18, 19, that is, their *yea* is *nay*, and their *nay* is *yea*: as St Paul himself explains. See Festus's etymology of *naucum*.

4 Therefore Christ said the same thing as Philo, that the best thing is that our word should be as our oath. So the Essenes, according to Josephus.

*tinere, atque ita se veracitati assuefacere, ut verba pro juramento accipiuntur.* <sup>7</sup> *Et alibi: ὁ τοῦ σπουδαίου λόγος ὄρκος ἔστω βέβαιος, ἀκλινῆς, ἀψευδέστατος. Viri boni oratio pro juramento sit firmo, immutabili, fallere nescio:* et quod de Essenis Josephus: πᾶν τὸ ρῆθεν ὑπὲν αὐτῶν ισχυρότερον ὄρκου, τὸ δὲ ὄμνύειν αὐτοῖς περισταται. *Quicquid dixerint validius est jurejurando: ac supervacua res ipsis habetur jurare.*

*Antiq. Jud.  
ii. 7. p. 786 c.*

*Diog. Laert.  
viii. 22.*

*Lib. vii. 8.*

*Cap. 16.*

*Apud Diog.  
Laert. i. 60.*

5 Ab Essenis, aut Hebræorum illis quos secuti sunt Esseni, videtur hoc sumssisse <sup>8</sup> Pythagoras, cuius hæc sententia: μὴ ὄμνύναι Θεούς· ἀσκεῖν γὰρ αὐτὸν δεῖν ἀξιόπιστον παρέχειν· non jurandum per Deos: quemque enim id curare debere, <sup>9</sup>ut nec jurato sibi credatur. Scythæ de se ad Alexandrum Curtio referente: *Jurando gratiam Scythes sancire ne credideris: colendo fidem jurant.* Cicero pro Roscio Comœdo: *Quæ pœna a Diis immortalibus perjuro, hæc eadem mendaci constituta est. Non enim ex pactione verborum quibus jusjurandum comprehenditur, sed ex perfidia et malitia, per quam insidice tenduntur alicui, Dii immortales hominibus irasci et succensere consuerunt.* Solonis dictum celebratur: καλοκάγαθίαν ὄρκου πιστοτέραν ἔχε. *Ea esto probitate, ut ei magis quam juramento cre-*

<sup>7</sup> *Et alibi]* De specialibus legibus (pag. 769 c.)

<sup>8</sup> *Pythagoras]* Nam et Hermippus Pythagoricus Pythagore Philosophiam ab Hebreis ductam dicebat, teste Origene contra Celsum. (Lib. i. pag. 13. Ed. Cant.) Idem et Josephus Hebreus prodidit, et Jamblichus Pythagoricus. [Locus Josephi exstat Lib. i. contra Apion. § 22. Edit. Oxon. Verum probabile admodum est, legendum ibi non 'Ιουδαῖον, sed Ἰδαῖον, ut conjectit Vir Eruditissimus J. Clericus, Tom. x. Biblioth. Selectæ, pag. 162, et seqq.

Quod spectat Jamblichum, voluit Auctor dicere Porphyrium: hic enim ex Diogene lib. de Incredibilibus refert, Pythagoram, inter alias, Hebreos etiam invisiisse, et ab iis hausisse quedam Philosophia sua dogmata, de Vita Pythag. § 11. Ed. Kusteri. Apud Jamblichum autem nil tale repertur. J. B.]

<sup>9</sup> *Ut nec jurato sibi credatur]* Philo (De Decal. pag. 756 c.) Ἡδη γὰρ δύε δύνις εἰς ἀπιστίαν ὑπονοεῖται. Jam enim is, a quo jusjurandum exigitur, perfidia est suspectus. Sophoclis OEdipode Coloneo dixerat OEdipus:

5 Pythagoras seems to have taken this from the Essenes, or those who followed the Essenes. His precept is, *Not to swear by the gods, for you ought to act so that men believe you without an oath:* so the Scythians in Curtius: so Cicero for Roscius; Solon; Clemens Alexandrinus; Alexis the Comic Poet. Cicero relates that at Athens, when a certain man, noted for his holiness and gravity, had to give his testimony, and approached the altar to swear, the judges with one

*datur. Clemens quoque Alexandrinus dixit viri boni esse, strom. vii. 8. τὸ πιστὸν τῆς ὁμολογίας ἐν ἀμεταπτώτῳ καὶ ἔδραιῷ δεικνύειν βίῳ τε καὶ λόγῳ. Fidem promissi ostendere in verborum ac vītæ stabilitate et constantia. Alexis Comicus :*

*Apud Stob.  
Serm. 27.*

*\*Ορκος βέβαιος ἔστιν ἀν νεύσω μόνον.*

*Nutus mei pro jurejurando valent.*

Narrat Cicero oratione pro L. Cornelio Balbo, Athenis cum quidam apud eos qui sancte graviterque vixisset, et testimonium publice dixisset, et jurandi causa ad aras accederet, una voce omnes judices ne is juraret reclamassee; eo quod nolent religione videri potius quam veritate fidem esse constrictam.

6 A Christi dicto non discrepat Hieroclis illud ad au- p. 164.  
reum carmen : ὁ σέβον ὄρκον ἐν ἀρχῇ παραγγείλας, τὴν ἀποχὴν τοῦ ὀμνύναι προστάττει περὶ τῶν ἐκδεχομένων, καὶ αἴριστον τῆς ἐκβάσεως ἔχοντων τὸ πέρας. ταῦτα γάρ καὶ μικρὰ καὶ μεταπίπτοντα, διὸ οὐτε ἄξιον ἐπ' αὐτοῖς ὀμνύναι, οὐτὲ ἀσφαλές. Qui in principio dixerat, Jusjurandum reverere, eo ipso præceperat abstinere a jurando de his <sup>b</sup>quæ possunt fieri et non fieri, et incertum habent casus exitum. Talia enim et parvi ducenda sunt, et

Οὕτοι σ' ὃι ὄρκον γ' ἀν σιδὴν ή λόγῳ φέροις.  
Nolo te adigere jurejurando ut malum.

respondet Theseus :

Οὔκουν πέρα γ' ἀν σιδὴν ή λόγῳ φέροις.  
Nec plus haberos inde quam vocis sonum.  
(Vers. 642, 643.)

M. Antoninus in viri boni descriptione : μήτε ὄρκον δεόμενον· nec opus habens jurejurando, (Lib. III. § 5.) Chrysost. de Statuis xv. εἰ μὲν πιστεύεις ὅτι αἱηθήσεστιν δὲ δνῆρος, μήτε ἀπαγάγγει τοῦ ὄρκου τὴν δινάγκην. εἰ δὲ οἶδας ὅτι ψεύδεται, μήτε ἀναγκάσῃς ἀπιορκεῖν. Si credis veracem esse eum, quicum tibi negotium est, noli ei jurejurandi imponere nec-

sitatem : quod si scis fore ut mentiatur, ne coge eum et pejerare. (Tom. vi. pag. 566. Edit. Savil.)

<sup>b</sup> Quæ possunt fieri et non fieri] Bene hoc animadvertisit Chrysostomus de Statuis [Orat. XIV. Tom. VI. pag. 553] : ὅτι κάνει μηδὲ συναρπασθεῖς, μηδὲ ἀκτων, μηδὲ ἀγνοῶν τοῦτο πάθη, ὑπ' αὐτῆς τοῦ πρόδημάτος φύσεως, καὶ ἔκων καὶ εἰδὼς αἴναγκασθήσεται ἀπιορκῆσαι πάντων. Etiam si non eveniat id tibi quod impetu abruptus, aut coactus, aut nec cogitans juraveris, ipsa negotii natura id interdum secum feret, ut et volens et sciens falsum jurasse deprehendaris. Et

voice refused to have the oath administered, his character being guarantee sufficient.

6 The maxims of Hierocles on the Golden Poem are not different, *He who said, Reverence an oath, by that very precept enjoined you to abstain from swearing with regard to future uncertain matters. About such it is neither worthy nor safe to swear.* So Libanius in praising the Christian Emperors : Eustathius on the Odyssee.

*mutabilia sunt, unde nec dignum de iis jurare, nec tutum.* Et Libanius in Christiani Imperatoris laudibus ponit: ἐπιορκίας τοσοῦτον ἀποστατῶν, ὥστε καὶ πρὸς τὰς εὐορκίας ἔχειν εὐλαβῶς· a perjurio tantum abest, ut etiam vera jurare vereatur. Eustathius ad illud Odyssææ Ξ: ἀλλ' οἵτοι ὄρκον μὲν ἔάσομεν· sic ait: οὐ χρεία ὄρκον ἐν τοῖς ἀδήλοις πρὸς βεβαιώσιν, ἀλλ' εὐχῆς πρὸς ἀποτέλεσμα· In rebus incertis non ad asseverationem juramentum adhibendum, sed preces pro bono exitu.

Lib. xiv. v.  
171.

Can. in c.  
quer. de  
jurejur.

Diod. xvi. 43.

§ Jur. D. de  
jurejur.

Mysa. ob. 17.

Cont. 1.

Suet. c. 42.

Plut. in Eum.

p. 585 r.

XXII. Ideo multis in locis vice jurisjurandi repertum est, ut <sup>c</sup>fides datis dexteris, quæ erat πίστις βεβαιοτάτη παρὰ τοῖς Πέρσαις, firmissimum apud Persas fidei vinculum, aut alio quo signo obstringatur, ea vi, ut, ni implatur promissio, promissor non minus detestabilis habeatur quam si pejerasset. Præcipue de regibus virisque principibus dictum est usitatissimum, fidem eorum pro jurejurando valere. Tales enim esse debent, ut cum Augusto dicere possint, <sup>d</sup>Bonæ fidei sum: et cum Eumene, vitam se potius posituros quam fidem: quo et illud pertinet Guntheri Ligurino [Lib. III. vers. 511]:

Nudo jus et reverentia verbo  
Regis inesse solet, quovis juramine major.

moi: σφαλερὸν μὲν δὲν καὶ περὶ ἑαυτοῦ τινα δμύναι. πολλὰ γάρ ὑπὸ τοῖν τῶν πραγμάτων περιστάσεως βιάζομεθα· Periculosem igitur etiam de suo actu jurare; multa enim nobis eripit ipsa rerum natura subjecta casibus. (Pag. 554.)

☞ <sup>e</sup>Fides datis dexteris] Meminere Eustathius ad Odyssææ Ω: Aristophanis Scholiastes ad Nubes, [vers. 81. Vide et in Acharnens. vers. 307. qui locus insignior est]: Diodorus Siculus (Libro XVI. c. 43): Crantzius Saxonicon XI. 27. In c. Ad aures, 3. de his que vi

metuseve causa, æquantzur juramentum et fides interposita.

<sup>d</sup>Bona fidei sum] De Evagora Salamininis rege Isocrates: ὃμοιως τὰς ἐν τοῖς λόγοις διαλογίας ὥσπερ τὰς τὸν ὄρκον διαφύλαξσαν. (Pag. 197 ε. Ed. H. Steph.) Symmach. x. 19. *Nusquam major spes quam in bonorum principum sponsione.* Nicetas de Alexio Isaaci fratre Lib. III. Βασιλεὺσι παρὰ πᾶν ἔτερον εὐρκεῖν τιθέναι περὶ πλείστου χρέων. *Regibus jurisjurandi fides ante omnia alia ponenda est.* (Cap. 4.)

XXII. Hence, in many cases, instead of an oath, was introduced a practice that good faith should be confirmed by giving the right hand, or some other sign; with this implication, that if the promise was not fulfilled, the promiser was held no less detestable than if he had perjured himself. Especially it is a common saying, concerning kings and princes, that their word goes for their oath. For they ought to be such that they can say with Augustus: I am a man of good faith: and with

Laudat oratione pro Deiotaro Cicero C. Cæsar's dexte- cap. 3.  
ram, non in bellis et præliis, quam in promissis et fide firmio-  
rem. Et heroicis temporibus sceptrum erectum pro regum  
jurejurando valuisse notatum Aristoteli.

POL. III. 14.

Eumenes, that they would sooner forfeit their life than their word: as also Gunter says to Ligurinus.

Cicero in his oration for Deiotarus, praises Cesar by saying that his hand was as firm in pledging truth as in fighting battles. And in the heroic times, a sceptre was set up as the king's oath, as Aristotle notes.



## CAPUT XIV.

### DE EORUM QUI SUMMUM IMPERIUM HABENT PROMISSIS ET CONTRACTIBUS ET JURAMENTIS.

- I. *Refellitur sententia statuens restitutiones in integrum ex jure civili venientes ad regum actus, qua tales sunt, pertinere: item regem ex juremento non teneri.*
- II. *Ad quos regum actus leges pertineant, distinctionibus explicatur.*
- III. *Jurejurando rex quando teneatur, aut non teneatur.*
- IV. *Quatenus rex teneatur his quos sine causa promisit.*
- V. *Uetus ejus quod de legum vi circa regum contractus dictum est.*
- VI. *Rex subditis obligari naturaliter tantum, aut et civilitate, quo sensu recte dicatur.*
- VII. *Jus quæsitum subditis licite quomodo auferatur:*
- VIII. *Rejecta hic distinctio quæstiæ ex jure naturali aut civili.*
- IX. *Contractus regum an leges sint, et quando.*
- X. *Quomodo ex regum contractibus teneantur omnium bonorum heredes.*
- XI. *Quomodo ex iisdem contractibus obligentur qui in regnum succedunt:*
- XII. *Et quatenus.*
- XIII. *Beneficia regum quæ revocabilia sint, quæ non, distinctione explicatur.*
- XIV. *Contractibus invasorum imperii an teneatur cuius erat imperium.*

I. 1 **PROMISSA**, contractus, et juramenta Regum, et qui alii iis pares jus in republica summum obtinent, peculiares habent quæstiones, tum de eo quod ipsis in actus suos licet, tum de eo quod in subditos, tum de eo quod in successores. Quod primum caput attinet, quæritur an ipse rex, ut subditos suos, ita se quoque restituere in integrum, aut contractum irritum facere, aut a jurejurando se exsolvere possit. Bodinus censet iisdem ex causis regem, <sup>1</sup> sive aliena

Lib. I. a. p.  
138.

<sup>1</sup> Non vult Bodinus, restitutionem illam Regis, sive qua Regis, sive qua Privati, fieri ex Legibus Civilibus, sed ex æquitate naturali, cuius beneficium

Regi denegari sane iniquum esset. De re ipsa plura diximus in Notis nostris Gallicis ad hunc locum. *J. B.*

### CHAPTER XIV. *Of the Promises, Contracts, and Oaths of Sovereigns.*

I. 1 The Promises, Contracts, and Oaths of Kings, and other persons who have like authority, give rise to peculiar questions, both as to the lawful power they have over themselves and their own actions, and that which they have over their subjects, and that which they have over their successors.

fraude ac dolo, sive errore circumventum, sive metu, restitui posse, ex quibus subditus restitueretur, tum in iis quæ ad jura majestatis imminutæ, tum in iis quæ ad privata commoda pertinent. Addit, ne jurejurando quidem teneri regem, si ejusmodi sint pacta conventa, a quibus discedere lex patiatur, etiamsi pacta honestati sint consentanea: non enim ideo teneri quia juraverit, sed quia justis conventionibus quisque teneatur, quatenus alterius intersit.

2 Nos, ut alibi distinximus, ita hic quoque distinguendum censemus inter actus Regis qui regii sunt, et actus ejusdem privatos. Nam in regiis actibus quæ rex facit eo loco habenda sunt, quasi communitas ficeret: in tales autem actus sicut leges ab ipsa communitate factæ vim nullam haberent, quia communitas seipsa superior non est, ita nec leges regiæ. Quare adversus hos contractus restitutio locum non habebit: venit enim illa ex jure civili. Non admittenda igitur exceptio regum adversus contractus quos minores fecissent.

II. 1 Plane si populus regem fecerit non pleno jure, sed additis legibus, poterunt per eas leges contrarii actus irriti

As to the first head, it is made a question whether the king, as he can relieve his subjects from an oath, can do the same to himself, and put himself back into his original condition. Bodinus thinks that the king may be so reinstated, on the same grounds as a subject would be so; whether he have been circumvented by the fraud and deception of another party, or by his own error, or fear; and this, both in matters which affect the rights of the sovereignty, and those which pertain to private advantage. He adds, that the king is not even bound by an oath, if the conventions made are of that kind from which the law permits parties to recede, even though the agreement is conformable to propriety; for (he holds) he is not therefore bound, because he has sworn, but because every one is bound by just conventions, so far as the interest of another is concerned.

2 We make a distinction here, as we have done in other places, between the acts of the king which are royal acts, and acts of the same person which are private acts. For in royal acts, what the king does is to be held as if it were done by the community: and as laws made by the community itself would have no force over such acts, because the community is not superior to itself, so neither have laws made by the king any such force. Therefore against such contracts, restitution will not hold: for this restitution is a creature of the Civil Law. And thus kings are not relieved from contracts which they had made as minors.

II. 1 If a people have established a king who has not plenary

fieri, aut omnino, aut ex parte, quia eatenus populus jus sibi servavit. De iis autem actibus regum qui pleno jure regnant, sed regnum non ut proprium possident, quibus regnum aut regni pars aut res fiscales alienantur, egimus supra, et ostendimus hos actus ipso naturæ jure nullos esse, ut factos de re aliena.

2 At privati actus regis considerandi sunt, non ut actus communitatis, sed ut actus partis, ac proinde facti eo animo, ut communem legum regulam sequantur. Unde etiam leges, quæ actus quosdam aut simpliciter, aut si is qui læsus est velit, irritos faciunt, locum et hic habebunt, quasi sub ea conditione contractum foret. Sic videmus reges quosdam adversus fœnere malum sibi consuluisse juris remedii. Poterit tamen rex ut aliorum ita suos actus his legibus solvere; quod an facere voluerit, ex circumstantiis erit aestimandum. Si fecerit, judicanda res erit ex mero jure naturali. Hoc addendum, si quæ lex actum irritum faciat, non in favorem agentis, sed in poenam, hanc in regum actibus locum non habituram, <sup>2</sup>ut nec

<sup>3</sup> Non quidem poenam, quatenus cō- ciscitur: sed quatenus pertinet ad dam- actionem involvit, et a Superiori profi- num datum alteri, cum quo contractum

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rights, but is under additional legal constraints, acts contrary to these laws may be by them made void; either altogether, or in part; because to this extent the people had retained a right to itself. In the case of kings who reign with plenary rights, but have not the kingdom as their own property, such acts of theirs as alienate the kingdom or a part thereof, or its revenues, have been discussed above; and we have shewn that such acts are by Natural Law void, as acts done to the property of another.

2 But the private acts of the king are to be considered, not as the acts of the community, but as acts of a private party, and consequently, done with the intention of following the common rule of law. Wherefore the laws which make some acts void, either absolutely, or if the person injured by them demands that they should be so, hold here also; as if the contract had been made under that condition. And accordingly we have seen certain kings protect themselves in this way against the evil of usury\*. But the king may release his own acts, as he may those of others, from these laws: and whether he intends to do this, is to be estimated from the circumstances. If he does, the matter must then be judged by mere Natural Law. This is

\* Gronovius says that Grotius is here making an excuse for Philip II. of Spain, who repudiated a portion of his debts in 1596: and refers to Mezeray, B. xviii. Barbeyrac adds, on the same authority, that two years after, Philip revoked this act, and acknowledged his debts.

alias leges poenales et quicquid vim habet cogendi. Nam punitio et coactio non possunt procedere nisi a voluntatibus diversis: itaque cogens et coactum requirunt distinctas personas, neque sufficient distincti respectus.

III. Juramentum autem Rex irritum reddere antecedenter potest ut privatus, si se ipse potestate tale quid jurandi plane privaverit priore juramento: consequenter non potest, quia hic quoque personarum distinctio requiritur. Nam quæ consequenter irrita redunduntur, jam antea exceptionem in se habebant, nisi superior noluerit: at ita jurare ut tenebris nisi ipse nolis, perabsurdum est, et naturæ jurisjurandi contrarium. Et si vero ex jurejurando jus quæsi alteri non possit, ob aliquod vitium in persona, tamen eum qui juraverit Deo obstringi supra ostendimus: quod ad reges non minus quam ad alios pertinet, contra quam sentit dicto loco Bodinus.

IV. Promissa quoque plena, et absoluta, atque acceptata, naturaliter jus transferre demonstratum supra est, quod itidem ad reges non minus quam ad alios pertinet, ita ut improbanda

est, reparandum. Hoc enim respectu legi. Ostendimus id plenius in notis <sup>Ang. ad L.  
Luc. 2. D. de  
Curt. Jun.  
cons. 138. n.</sup> 4 nostris Gallicis ad hunc locum. J. B.

to be added; that if any law make an act void, not in favour of the doer, but as a penalty on him, this does not hold against the acts of kings; as in other matters also, penal laws, and all which has a power of coercion do not apply to them. For punishment and coercion can only proceed from diversity of will: the coercer and the coerced require distinct persons; distinct relations [of the same person] are not sufficient.

III. A king, as a private person, may nullify an oath, *antecedently*, if by a prior oath he deprive himself of the power of swearing to such an effect; but *consequently*, [after the act,] he cannot do this [by his royal authority:] for here too a distinction of persons is required. For the oaths which are nullified subsequently to the act, were already understood to be made with the exception, “except a superior refuse his consent;” but to swear in such a sense, that you are bound, except you yourself refuse consent, is absurd, and contrary to the nature of an oath. But although a right may not be acquired by another person in virtue of the oath, on account of some defect in the person who swears, yet that he is bound to God, we have shewn above: and this applies to kings no less than to others; contrary to the sentiments of Bodinus in the place cited.

IV. Also Promises, when full, absolute, and accepted, naturally transfer a right, as we have shewn above; and this likewise applies to

sit hoc quidem sensu eorum sententia, qui negant regem teneri unquam his quæ sine causa promisit: quod tamen quo sensu locum habere possit mox videbimus.

V. Ceterum quod diximus supra, leges civiles regni locum non habere in Regum pactis et contractibus, id recte videt et Vasquius. Sed quod infert emtionem et venditionem sine certo pretio, locationem et conductionem non expressa mercede, emphyteusin <sup>3</sup>sine scriptura, si a regibus fiant, valitura, non concedendum est: quia hi actus non a rege qua rege, sed ab eo quasi alio quovis fieri solent. In quo actuum genere tantum abest ut communes regni leges vim nullam habeant, ut etiam leges oppidi, ubi Rex habitat, valere credamus; quia speciali ratione rex ibi se habet, ut illius cœtus membrum. Quæ tamen ut diximus ita procedunt, nisi circumstantiae ostendant placuisse Regi suum actum ab illis legibus immunem facere. Aliud vero exemplum, quod idem adfert Vasquius de promissione quolibet modo facta, bene convenit, et ex his, quæ supra diximus, explicari potest.

#### VI. 1 Contractibus quos rex cum subditis iniit obligari

<sup>3</sup> Verius est, Scripturam non requiri, ex natura illius contractus. Vide VENNIMUM, in Tit. *Instit. De Locat. Conduct.* § 3. J. B.

<sup>4</sup> Confer, circa hanc divisionem, PUDENDORFIUM, *De Jure Nat. et Gent.* Lib. III. cap. iv. § 5. J. B.  
■ *Abundantium bonitatis*] Huc per-

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kings, no less than to others: so that we condemn, in this sense, the opinion of those who say that a king is never bound by the promises which he made without a cause. In what sense this may be truly held, we shall hereafter see.

V. What we have said above, that the Civil Law of the kingdom does not hold in the compacts and contracts of kings, Vasquius also has rightly seen. But his inferences, that buying and selling without a certain price, letting and hiring without stating the hire, a lease without a writing, are valid if done on the part of kings, is not to be conceded: because these acts are not done by the king as king, but by him as by any other person. In this class of acts, it is so far from being true, that the common laws of the kingdom have no force, that we maintain that even the laws of the town in which the king lives are of force: inasmuch as the king abides there in a special manner, as a member of that society. Which, however, is as we say, except circumstances shew that it pleases the king to make his act free from the authority of those laws. Another example which Vasquius gives, of a promise made in any way, agrees well with this rule, and may be explained by what we have said above.

eum naturaliter tantum, non civiliter, Jurisconsulti ferme omnes sentiunt, quod loquendi genus perobscurum est. Nam *'naturalis obligatio interdum a juris auctoribus dicitur per abusionem de eo quod fieri natura honestum est, quanquam non vere debitum, ut legata integra sine detractione Falcidiæ præstare, solvere debitum quo quis in poenam creditoris erat liberatus, vicem beneficio rependere, quæ omnia cessare faciunt condictionem indebiti : interdum vero magis proprie id quod vere nos obligat, sive inde jus alteri oriatur, ut in pactis, sive non oriatur, ut in plena et firma pollicitatione.* Maimonides *Hebraeus* lib. iii. Ducas dubitantium capite 54 tria hæc apte distinguit, et quæ non debentur ait venire benignitatis nomine, id est דָבָר, quam alii interpretes ad Prov. xx. 28 explicant פָּלָנַת חַטּוּבָה *\*abundantiam bonitatis*; quæ debentur ex jure stricte sumto, מִשְׁמָךְ judicium Hebræis vocari; quæ ex honestate, *justitiam ἡρτάς*, id est æquitatem; ἔλεον, κρίσιν, πίστιν dixit interpres Matthæi xxiii. 23 ubi πίστιν vocat quæ Hellenistis plerumque est δικαιοσύνη. Nam κρίσιν pro eo quod stricte debetur reperias etiam 1 Macc. vii. 18 et viii. 32.

tinent ea quæ non ob aliam causam fiunt  
quam ut liberalitas et munificentia exerceantur, ut loquitur lex i. D. de Donacionibus : χρηστότης ἐκ πηγῆς πλου-

σίας ἀποφέει τὴν ἡμερότητος<sup>\*</sup> Ex ubere  
fonte mansueti ingenii manat beneficentia : Plutarchus *Catone majore*, (pag.  
339 A. Tom. i.)

VI. 1 Almost all jurists deliver an opinion that by contracts which the king enters into with his subjects, he is obliged naturally only, not civilly: which is a very obscure way of speaking. For juristic writers sometimes by an abuse of language call that, *natural obligation*, which it is by nature a handsome thing to do, though it is not truly due: as for an executor to pay legacies entire without the deduction which the Falcidian law allows; to pay a just debt when the creditor has been deprived of his legal right by a penal sentence; to return a benefit for a benefit; none of which can be recovered by an action of false debt. But sometimes, more properly, they use the term for that which truly *obliges* or binds us; whether another person thereby acquire a right, as in pacts, or does not, as in a full and firm *pollicitation* or proffer. Maimonides distinguishes these three cases; things which are not due, he calls *kindnesses*; things due by strict law, *judgments*; things due by propriety, *justice*. So Matth. xxi. 23, *mercy, judgment, and faith*, are by some interpreted, as if *faith* were put for *righteousness*: *judgment* means what is strictly due: see 1 Macc. vii. 18, and viii. 32.

Bal. ad l. i.  
D. de pact.  
L. Princ.  
leg. 31. D.  
de leg. L.  
ult. C. de  
trans. L. Si  
aquam 9.  
C. de ser.  
Dd. in c. 1.  
de Consul. Bal.  
L. Si pcc. 10.  
C. de cond.  
ob caus. et in  
l. ex imp. 3.  
C. de test.  
L. I. C. ad  
l. Pact.  
L. Si pen. 19.  
D. De cond.  
index.  
L. Sed et si  
leg. 28.  
concul. 11.  
D. De pet.  
hered.

*Jas. I. v. de cond. caus. dat.  
Castral. de Imp. q. 3.  
v. 51.  
Vasq. Lib. I. contr. III.  
cap. 3. n. 1.  
Bod. I. c. 8.*

2 Civiliter quoque obligari ex actu suo dici quis potest, aut eo sensu, ut obligatio procedat non ex mero jure naturali, sed ex jure civili, vel ex utroque, aut eo sensu, ut in foro actio inde detur. Dicimus ergo ex promisso. et contractu Regis, quem cum subditis iniit, nasci veram ac propriam obligationem, quae jus det ipsis subditis: ea enim est promissorum et contractuum natura, ut supra ostendimus, etiam inter Deum et hominem. Quod si tales sint actus qui a rege, sed ut a quovis alio fiant, etiam civiles leges in eo valebunt: sin actus sit regis qua regis, ad eum civiles leges non pertinent: quod discrimen a Vasquio non satis observatum est; neque tamen eo minus ex utrovis actu nascetur actio, nempe ut declaretur jus creditoris, sed coactio sequi non poterit, ob statum eorum quibuscum negotium est: nam subditis cogere eum, cui sunt subditi, non licet, sed aequalibus in aequales id jus est a natura, superioribus in subditos etiam ex lege.

*Vasq. Lib. I. contr. III.  
c. 5. in pr. et  
l. 4. c. 1.  
Castr. Lib. I.  
aut ex vi supereminentis dominii. Sed ut id fiat ex vi super-*

\* Vide PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. VIII. cap. 5. § 7. J. B.

2 Again; a person may be said to be civilly obliged by his own act, either in this sense,—that the obligation does not proceed from mere Natural Law, but from the Civil Law, or from both;—or in this sense, that it gives ground for an action in a Court of Law.

We say then that by the promise and contract of a king, which he enters into with his subjects, there arises a true and proper obligation, which confers a right upon the subjects: for this is the nature of promises and contracts, as we have shewn above, even between God and men. But if the acts be such as are done by the king, but done by him, only as by any other man, the Civil Laws also will be valid in that case: but if the act be an act of the king as king, the Civil Laws do not apply to that; which distinction has not been sufficiently attended to by Vasquius. But notwithstanding this distinction, in either case a legal action will arise from the act; namely, to the end that the right of the creditor may be declared: but coaction cannot follow, on account of the condition of those with whom the business is. For it is not allowable for subjects to compel him whose subjects they are: equals have such a right towards equals, by nature; superiors have it over subjects by law only.

VII. This also is to be noted, that a right, even when it has been acquired by subjects, may be taken away by the king in two modes; either as a Penalty, or by the force of Eminent Dominion.

eminens dominii, primum requiritur utilitas publica; deinde, ut si fieri potest compensatio fiat ei qui suum amisit, ex communi. Hoc ergo sicut in rebus aliis locum habet, ita et in jure quod ex promisso aut contractu queritur.

VIII. Neque ullo modo hic admittenda est distinctio quam adferunt nonnulli, juris quæsiti ex vi juris naturalis, <sup>et</sup> et ejus quod venit ex lege civili; nam in utrumvis par jus est regis, nec hoc magis quam illud sine causa tolli potest. Ubi enim dominium aut jus aliud alicui legitimo modo partum est, id ne sine causa ei auferatur juris est naturalis. Contra si rex faciat, haud dubie tenetur reparare damnum datum: facit enim contra verum jus subditi. Hoc ergo differt jus subditorum et jus exterorum, quod jus exterorum (hoc est qui nulla ratione subditi sunt) supereminenti dominio nullo modo subest: nam de poena infra videbimus: subditorum autem jus ei dominio subest, quatenus publica utilitas desiderat.

IX. Ex his quæ diximus et hoc appareat, quam falsum sit quod quidam tradunt, contractus Regum leges esse. Nam ex legibus nemini jus adversus Regem nascitur: ideo si eas

<sup>a</sup> Adde, quæ infra dicentur, Lib. III. cap. 20. § 9. J. B.

Bal. in l. Cœz.  
15. D. de pub.  
Bart. in l.  
sic 7. D.  
quod i. cuius.  
ann. non.  
Jas. cons. 1.  
col. 4. vol. L  
et alii alleg.  
a Vasq. d.  
c. 3. n. 5.

But to do this by the force of Eminent Dominion, there is required, in the first place, public utility; and next, that, if possible, compensation be made, to him who has lost what was his, at the common expense. And as this holds with regard to other matters, so does it with regard to rights which are acquired by promise or contract.

VIII. Nor may we, in this matter, in any way admit the distinction which some make, between rights acquired by force of Natural Law, and those which come from the Civil Law. For the right of the king over the one class and the other is equal, and the latter cannot, any more than the former, be taken away without cause. For when ownership, or any other right, has been legitimately acquired by any one, that it may not be taken away from him without cause, is a matter of Natural Law. If the king act in any other way, he is without doubt bound to repair the damage done: for he acts against the true right of the subject. In this therefore the rights of subjects and the rights of foreigners differ. That the rights of foreigners, (that is, of those who are not subjects in any way,) are by no means subject to the right of Eminent Dominion; (whether they are subject to Penalty, we shall hereafter see;) but the rights of subjects are liable to that right, so far as public utility demands.

IX. From what we have said, this also appears:—how false that is which some deliver, that the Contracts of Kings are Laws. For, from

revocet nemini facit injuriam. Peccat tamen si sine justa causa id faciat. At ex promissis et contractibus jus nascitur. Contractibus ligantur contrahentes tantum, legibus subditi omnes. Possunt tamen quædam esse mixta et contractibus et legibus, ut contractus cum vicino rege, aut cum publicano factus, qui simul pro lege publicatur, quatenus ei insunt quæ subditis observanda sunt.

X. <sup>b</sup>Veniamus ad successores : de quibus adhibenda distinctio est, sintne omnium simul bonorum heredes, ut qui regnum, quod in patrimonio est, testamento, vel ab intestato accipiunt; an successores regni duntaxat, puta ex electione nova, aut ex præscripto ; sive imitatione quadam vulgaris hereditatis, sive aliter : an vero mixto jure succedentes. Nam qui bonorum omnium ita ut regni heredes sunt, quin promissis et contractibus teneantur dubitandum non est. Pro debitis enim etiam personalibus bona defuncti ut obligata sint, ipsi rerum dominio cœsum est.

<sup>b</sup> *Veniamus ad successores*] Vide Scriptores quibus uitetur Reinckingius lib. i. classe III. cap. 10.

<sup>c</sup> *At qui in jus regni duntaxat succedunt*] Vide Aymonium editum a Frenhofer p. 373.

<sup>d</sup> *Directe, hoc est dixerat, hos successores regni, qua tales, non obligari satis manifestum est*] Sic Solomo obligatus non fuit eo promisso, quod Semei David fecerat. [Vide i. Reg. ii. 9. et quod ea de re dictum est apud PUFEX-

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laws, no one acquires a right against the king; therefore, if he revokes them, he does wrong to no one. (He sins, however, if he do so without just cause.) But from his promises and contracts, rights arise. By contracts, the contracting parties only are bound; to laws, all are subject. But yet some transactions may be mixed of contracts and laws, as a treaty made with a neighbouring king, or with a farmer of the revenues, which is at the same time published as a Law, so far as it contains things to be observed by the subjects.

X. Let us proceed to the case of Successors: and with regard to them, we must make a distinction, whether they are heirs to the whole property of the deceased as well as to the kingdom; as those who receive a patrimonial kingdom by testament, or by intestacy; or whether they are only successors to the kingdom; suppose by a new election, or by the law of the land, or by some imitation of the common rule of inheritance, or otherwise; or whether, finally, they succeed by mixed right. For with regard to those who are heirs of all the property as well as of the kingdom, there can be no doubt that they are bound by the promises and contracts of their predecessor. For the rule, that the property of the deceased is bound for debts, even for

XI. 1 <sup>c</sup>At qui in jus regni duntaxat succedunt; aut partim in bona, in jus regni vero in solidum; quatenus obligentur, tam dignum est quæri, quam confuse hactenus tractatum est. <sup>d</sup>Directe, hoc est *αὐτέσως*, hos successores regni, qua tales, non obligari satis est manifestum: quia jus non accipiunt ab eo qui proxime decessit, sed a populo, sive ea successio propius accedat ad jus hereditatum vulgarium, sive absit longius: de quo discriminé supra egimus.

2 Sed *εἰμιέσως*, id est <sup>e</sup>per interpositam civitatem, obligantur etiam tales successores: quod sic intelligetur. Cœtus quilibet, non minus quam personæ singulares, jus habet se obligandi per se, aut per majorem sui partem. Hoc jus transference potest tum expresse, tum per consequentiam necessariam, puta imperium transferendo; nam in moralibus qui dat finem, dat ea quæ ad finem perducunt.

XII. 1 Non tamen in infinitum hoc abit: neque enim obligandi infinita potestas ad imperium recte exercendum neces-

DORFIUM, *De Jure Nat. et Gent.* Lib. iv. cap. 11. § 13. *J. B.*

<sup>e</sup> Per interpositam civitatem obligantur] Similia vide c. 1. *de solutionibus*. Propius ad rem facit c. Abbate, 3. *de sententiis et re judicata*, ubi notanda

verba: *Cum tam supradicti avi donatio quam locorum acquisitio promisorum fuerint nomine regni factæ. Vide et Treutl. parte i. disput. vi. thesi 7. Syr. de pace religionis concl. 19.*

personal debts, is a rule coeval with property itself.

XI. 1 But of those who succeed only to the kingdom; or to the property as sharers only, but to the kingdom, alone; how far they are bound, is a matter worthy of inquiry, especially as it has hitherto been treated very confusedly. That the successors of the kingdom, as such, are not directly and *immediately* bound [by those contracts] is evident enough; because they receive their rights, not from him who has lately deceased, but from the people; whether the rule of succession approach more nearly to the rule of common inheritance, or recede further from it; of which difference we have treated above.

2 But *mediately*, that is, by the mediate effect of the State, such successors also are bound; which will be thus understood. Every society, no less than individual persons, has the right of binding itself, by its own act, or that of the majority. And this right it may transfer, either expressly, or by necessary consequence; suppose, by transferring the government: for in moral matters, he who gives the end, gives the means which lead to the end.

XII. 1 But this does not go to an infinite extent. For an infinite power of imposing such obligations is not necessary, in order rightly

saria est, ut nec ad tutelam aut curationem, sed quatenus ejus potestatis natura exigit. <sup>1</sup> *Tutor domini loco habetur*, inquit Julianus, *cum rem administrat, non cum pupillum spoliat*; quo sensu et illud intelligendum quod dixit Ulpianus, magistri societatis pactum societati non prodesse tantum, sed et obesse. Neque tamen, ut quidam existimant, lex hæc ad naturam negotiorum gestorum exigenda est, ut tum demum ratus sit habendus actus, si utiliter gestus sit. Nam ad tales angustias reipublicæ imperantem redigere, ipsi reipublicæ esset periculoseum. Quare nec sensisse hoc credendus est populus cum imperium detulit. Sed quod a Romanis Imperatoribus in causa civitatis responsum est, valere transactionem quam magistratus fecissent in re dubia, non si indubitate id quod deberi possit remissum sit, idem ad nostram de populo toto quaestionem referri debet ac potest, sed servata proportione.

<sup>1</sup> *Tutor domini loco habetur, inquit Julianus, cum rem administrat, non cum pupillum spoliat]* Huc pertinent ea que habet Camdenus parte iv. Elisabethæ anno clx iō xciv; et que Cromerus habet de Georgii Bohemia regis ære alieno imprudente suscepto a Wladislawo, lib. xxvii. (pag. 593.)

<sup>2</sup> *Esse quedam evidenter stultæ atque absurdæ]* Ut lex Cabadis Persarum regis apud Procopium (*Persic.* Lib. 1.

c. 5) et Agathiam. (Lib. iv. c. 12.) Hoc legis argumentum ad alienationes aptat Petrus, Legatus Justini II. ad Chosroen, agens de iis que Justinianus Saracenis promissæ videbatur: οὐ γάρ ἐνδέ αὐθόδε ἔθει, φημὶ δὲ τὸ πλεον καὶ νόμῳ μὴ λυστελούντε, καὶ εἰ πέφυκε βασιλεὺς δὲ τὸ ἔθος ἰσχυροποιήσας ἤγουν νομοθετήσας, πολιτείᾳ καταδικασθήσεται ποτε. Non enim ex unius hominis consuetudine, aut etiam lege non utili,

to exercise the government: as such power also is not necessary for a guardian or a *Tutor*; but only so much as the nature of the office requires. The *Tutor* is reckoned in the place of the owner, says Julian, when he administers his pupil's affairs, not when he plunders him: and in this sense we are to understand what Ulpian says, that the contract of the master of a society, may not only bring advantage to the society, but also disadvantage. But yet we are not, as some hold, to reduce the engagements of a king to the rules of one man undertaking another's busines; namely, that his acts are then only valid when they turn out to the advantage of the principal party. For to put the Ruler of the State to such a strait, would be dangerous to the State itself. And accordingly, the community is to be supposed to have held this opinion, when it bestowed the government upon him. And what the Roman Emperors declared, in a Rescript with respect to the corporation of a town,—that what was transacted by the magistrates should be of force in a doubtful case, but not, if what was unquestionably due was given away,—may be and ought to be applied to our question, relative to the whole People, observing a due pro-

2 Sicut ergo leges non quævis subditos obligant, possunt enim, etiam extra eas quæ jubent quod illicitum est, <sup>g</sup> esse quædam evidenter stultæ atque absurdæ; sic et contractus regentium ita obligant subditos, si probabilem habeant rationem, <sup>h</sup> quod in dubio ob regentium auctoritatem præsumi debet. Quæ distinctio multo est melior, quam illa quæ a multis afferri solet de exitu modicæ aut immodicæ læsionis. Non enim exitus in hac re, sed probabilis ratio rei gerendæ spectanda est: quæ si adsit, et populus ipse obligabitur, si quo casu sui juris esse inceperit, et successores ut populi capita. Nam et si quid populus liber contraxisset, obligaretur is qui postea regnum plenissimo jure acciperet.

3 <sup>1</sup>Landatur Cæsar Titus hoc nomine, quod beneficia a superioribus concessa a se peti passus non est, cum Tiberius, et eum secuti, non aliter rata habuissent superiorum beneficia,

*etiam si Imperator sit qui morem talen  
firmaverit, aut lege sanzerit, respublica  
unquam condemnabitur. [Hoc est e  
MENANDRI Protectoris Legat. c. 12.  
sed ibi Joannes Legatus loquitur, non  
Petrus. J. B.]*

<sup>1</sup> Quod in dubio ob regentium auctoritatem presumi debet] Sidonius Lib. v. épistola xvii. Quicquid sponderit princeps, semper reddibet principatus. Vide Ambrosium in laudibus Theodosii,

(pag. 492 c. *Ed. Paris. 1569.*) Symma-chum Lib. iv. epist. 7, et 19. Lib. v. 37. Conc. Toletanum v. c. 6. C. *ceterum* 3. *de Donationibus*: debita Justiniani, quae magnum reliquerat, a Justino impe-rii successore persoluta narrat Corippus Lib. II.

<sup>1</sup> Laudatur Cesar Titus hoc nomine] Historia apud Suetonium c. 8. apud Xiphilinum ex Dione, (pag. 212. Edit. Rob. Steph.) et apud Victorem, (in Cæ-

portion in the application.

2 As the subjects are not bound by every law; for there may be laws, (even without going to those which command something unlawful,) which are evidently foolish and absurd;—so too the contracts of Governors then bind their subjects, when they have a probable reason; and in a doubtful case, this may be presumed, on the authority of the Governors. And this distinction is much better than that which is put forth by many, governed by the result, according as it is a moderate or an immoderate damage. For it is not the result which is to be regarded in such a case, but the probable reason for doing the thing; if there be such a reason, the People itself will be bound, if by any event it should become its own master; and the successors to the government, as the heads of the People. For, in like manner, if a free People had made any engagement, he who afterwards should receive the sovereignty, in the fullest manner, would be bound by the engagement.

<sup>3</sup> The emperor Titus is praised on this account, that he would not allow himself to be petitioned to confirm any thing which his

nisi eadem iisdem et ipsi dedissent. Titi exemplum secutus Imperator optimus Nerva in Edicto quod <sup>k</sup>apud Plinium extat sic ait: *Nolo existimet quisquam quæ alio Principe vel privatim vel publice est consecutus, ideo saltem a me rescindi, ut potius mihi debeat si illa rata et certa fecero, nec gratulatio ullius instauratis eget precibus.* At vero de Vitellio cum narrasset Tacitus eum, nulla posterum cura, lacerasse imperium, vulgo ad magnitudinem beneficiorum accurrente, quibusdam et pecunia emercantibus, addit: *Apud sapientes cassa habebantur, <sup>l</sup>que neque dari neque accipi, salva republica, poterant.*

4 Illud hic addendum est, si quo casu contractus incipiat vergere non ad damnum modo aliquod, sed ad perniciem publicam, ita ut ab initio contractus in extensione ad illum casum

*sarib. c. 10.) Simile c. Justitiae, 15. causa xxv. queset. i. Gail. obs. 11. lx. 15. Vide et Radevici historiam. Gunterus Ligurino Lib. v :*

*Neve securi factum subvertere reges  
Aut revocare queant, regali tuta sigillo  
Argumenta Duci, monumentaque certa reliquit  
(vers. 563, et seqq.)*

*Et libro viii. (vers. 579, &c.):  
Tanta tamen clari fuit indulgentia regis,  
Ut qualcumque bona priscorum munera regum  
Hactenus ista fide posederat, idque probare  
Legitimis poterat vel demonstrare tabellis,  
Principis assensu titulo gavisus eodem  
Nunc quoque possidat.*

<sup>k</sup> *Apud Plinium] x. Epist. 66.*

<sup>l</sup> *Que neque dari neque accipi, salva  
republica, poterant] Laudat et applicat  
Mariana ad immensam munificentiam  
Friderici Regis Neapolitani xxvi. 16.  
A Nerone donata etiam ab emitoribus  
repetit Galba, relicta decima. Tacitus  
*Historiarum* i. (cap. 20) et Plutarchus  
(in *Galb.* Tom. ii. pag. 1060 A.) Per-  
tinax etiam a libertis ea exigit quæ sub  
specie venditionis, Commodo Principe,  
lucrificerant. [Capitolinus, cap. 8.]  
Basilius Macedo Imperator repetit quæ  
Michael Imperator elargitus fuerat.  
Zonaras de eo (Lib. xvi, cap. 8. Ed.  
Reg.): 'Εψιφεστο ταρά πάγκων τοῦτο*

predecessors had granted, [holding them valid without such process ;] while Tiberius and those emperors who followed him, did not recognize the grants of their predecessors as valid, till they had themselves repeated them. The excellent emperor Nerva, following the example of Titus, says, in an edict which is extant in Pliny, *Let no man suppose that what he has obtained from another Prince, either privately or publicly, shall be by me revoked, that so, if I confirm those grants, he may be the more obliged to me; no man's congratulation need be accompanied by such petitions.* But on the other hand, when Tacitus had related of Vitellius, that he had torn the empire in pieces, reckless of the interests of posterity, the common world flocking about him to catch his extravagant gifts, and some even purchasing his favour with money; he adds: *Wise men held those grants to be void, which could be neither given nor received without damage to the State.*

4 That must also here be added; that if in any case a contract

censendus fuisset injustus et illicitus, tunc non tam revocari eum contractum posse, <sup>m</sup>quam declarari eum non ultra obligare, quasi factum sub conditione, sine qua juste fieri non potuit.

5 Quae de contractibus diximus, eadem intelligenda sunt <sup>n</sup>de alienatione pecuniae populi, aut rei alterius quam secundum leges rex alienare bono publico possit. Nam hic quoque similis adhibenda est distinctio, an probabilis donandi, aut aliter alienandi fuerit ratio.

6 At si contractus ad regni ejusve partis aut patrimonii regalis, quatenus id Regi permissum non est, alienationem pertineant, non valebunt, ut facti de re aliena. Tantundem erit in regnis restrictis, si quam materiam, aut actuum genus populus a potestate regia exceperit. Nam ut tales actus vale-

*εξ οὐδεμίας χρήματα λαβόντας εὐλόγου λαβῆσ, ἀναίδοναι ταῦτα, οὐ τόγε δὴ μετριώτερον ημίσουν. Communi consensu placuit, ut qui pecunias nulla probabili ex causa acceperissent, partim totales, partim dimidium redderent.* Vide eundem Isaacio Comneno. (Lib. xviii. cap. 4.) De donationibus Ludovici XI. vide Serranum Carolo VIII. (pag. 413.) De ejusdem donationibus, etiam quae Ecclesiis factae, non servatis, Philippon Cominsem, Lib. ix. (Vers. Steidan. Lib. vi. cap. 7. ipsius Auctor.) Marianam vero de donationibus quas Arragonie rex Ramirus fecerat, rescissis, libro

x. c. 16. de Isabellæ donationibus rescissis per ipsam xxviii. 11. Cromerum de Casimiri regis Poloniæ testamento partim probato, partim improbato, xii. (Lib. xiii. pag. 322, 323.)

<sup>m</sup> *Quam declarari eum non ultra obligare]* C. Suggestum est, 9. de decimis. Exemplum in Actis Alfonsi et Sancti apud Marianam, Lib. xii. c. ultimo: apud Camdenum dicto anno c13 Io xcv. et anno c15 Io xcvi. in controversia Hanseatica.

<sup>n</sup> *De alienatione]* Habes huc pertinientia in Conciliis Galliæ tomo iii.

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begins to tend, not only to some loss, but to the ruin of the community, so that from the beginning the contract in its extension to that case would have been unjust and unlawful; then that contract may, not so much be revoked, as declared not to be binding any longer, as being made without the condition without which it could not justly be made.

5 What we have said of contracts, holds also of the alienation of the People's money, and of any other things which the king has by law a power to alienate for the public good. For here too a similar distinction is to be applied, whether there was a probable reason for giving or otherwise alienating.

6 But if the engagements have reference to the alienation of the kingdom or its parts, or of the royal patrimony, they will be invalid, as being a contract about that which is another's. The same will hold in limited monarchies, if there be any matter or kind of act

ant, populi per se, aut per eos, qui populum legitime referunt, consensus requiritur, ut ex iis quæ de alienatione supra diximus intelligi potest. Quibus distinctionibus adhibitis facile judicari poterit, justæ an injustæ fuerint exceptiones regum, qui priorum regum nomina exsolvere recusarunt, quorum heredes non fuerant: quarum exempla apud Bodinum videre est.

Lib. i. c. 8.  
§ Nequeniam.  
Curt. Jun.  
cons. 138. n.  
4. cons. 157.  
n. 18.  
Crav. de ant  
tem. 2. p. 1.  
part. prin.  
n. 38.  
Bell. in spec.  
prin. rubr.  
26.  
Ant. Gabr.  
Lib. i. tit. de  
fur. quæc.  
non tollend.  
cons. 6. n. 30.  
et concl. 7.

XIII. Illud quoque <sup>a</sup> multis traditum, beneficia Principum, quæ liberaliter sunt concessa, semper posse revocari, sine distinctione transmittendum non est. Sunt enim quedam beneficia quæ rex de suo facit, et quæ, nisi adsit precarii clausula, vim habent perfectæ donationis. <sup>b</sup>Hæc revocari non possunt, nisi quod subditos attinet in poenam, aut ob utilitatem publicam cum compensatione si fieri potest. Sunt alia quæ vinculum duntaxat legis demunt sine ullo contractu. Et hæc sunt revocabilia. Quia sicut lex sublata universaliter reponi universaliter semper potest, ita et particulariter sublata particulariter reponi. Nullum enim hic jus quæsitus est adversus legi auctorem.

<sup>a</sup> *A multis traditum*] Vide citatos per Reinkingium, libro ii. classe ii. cap. 8. num. 26. et sequentibus. <sup>b</sup>*Hac revocari non possunt*] Vide Affictum decis. cxxviii. num. 10.

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which the people has excepted from the royal power. For in order to give validity to such acts, there is required the consent of the People, either by itself, or by those who legitimately represent the People; as may be understood by what we have said above respecting alienation. By the application of these distinctions, it will be easy to judge whether the pleas of kings who refuse to pay their predecessors' debts, not being their heirs, are just or unjust: of which examples may be seen in Bodinus.

XIII. Nor is that which many have delivered, that the favours of Princes, granted out of pure liberality, may at any time be revoked, to be allowed to pass on without distinction. For there are some grants which the king makes out of his own property, and which, except they are granted expressly during pleasure only, have the force of a complete donation. And these cannot be revoked, except, in the case of subjects, in the way of penalty, or for the sake of public utility, and then with compensation if it may be. There are other grants which merely remove legal restrictions without any contract. These are revocable. Because, as the law which is relaxed universally may always be re-established universally, so, that which is relaxed particularly may be re-established particularly. For in this case no right against the author of the law is acquired.

XIV. Contractibus vero eorum, qui sine jure imperium invaserunt, non tenebuntur populi aut veri reges; nam hi jus obligandi populum non habuerunt. De in rem verso tamen tenebuntur, id est quatenus locupletiores facti sunt.

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XIV. By contracts made by those who without right have usurped the government, the People, or the Legitimate Sovereign are not bound. For Usurpers have no authority to bind the People. However, the People are bound by what has been expended for their benefit [by an usurper;] that is, so far as they are the richer for it.

## CAPUT XV.

### DE FEDERIBUS AC SPONSIONIBUS.

- I. *Publicæ conventiones quæ.*
- II. *Dividuntur in federa, sponsiones, pactiones alias.*
- III. *Federum et sponzionum discrimen, et in quid sponsiones obligent.*
- IV. *Rejecta divisio federum quam Menippus fecit.*
- V. *Federum divisio in ea quæ idem statuunt cum jure naturæ: et unde id natum.*
- VI. *Et ea quæ aliquid adjiciunt: quæ sunt æqualia;*
- VII. *Aut inæqualia, quæ rursum dividuntur.*
- VIII. *Federa cum his qui alieni sunt a vera religione licita esse jure naturæ:*
- IX. *Nec universaliter prohiberi lege Hebreæ;*
- X. *Nec Christiana.*
- XI. *Cautiones circa talia sedera.*
- XII. *Christianos omnes obligatos ad fedus incundum adversus hostes Christianismi.*
- XIII. *Si plures federatorum bellum gerant, cui potius opem ferri oporteat, distinctionibus explicatur.*
- XIV. *An tacite renovatum censeatur fedus.*
- XV. *An partis alterius perfidia alteram liberet.*
- XVI. *In quid toneantur sponsores si sponsio improbetur, ubi de Caudina sponsione.*
- XVII. *An sponsio non improbata obliget ex notitia et silentio, distinctionibus explicatur, ubi de sponsione Luctatiana.*

L. Conven. &  
D. de Paci. I. CONVENTIONES Ulpianus divisit in publicas et privatas: et publicam exposuit non ut quidam putant definitione, sed exemplis additis, quæ fit per pacem,<sup>1</sup> quod primum

<sup>1</sup> Vide Clariss. NOODRII Librum de Contr. iv. 25.

*Pactis et Transactionibus*, cap. 7. J. B.  
<sup>a</sup> Quod apud Senecam patrem est] <sup>b</sup> In regnis, regum est fedus facere]

Vide que infra Lib. III. c. xx. § 2. et

### CHAPTER XV. Of Treaties and Sponzions\*.

I. Compacts or Conventions are divided by Ulpian into public and private: and public, he expounds, not by definition, but by examples which he gives; a treaty of peace, which is the first example; or when the generals in a war make some convention, which is the second. By public compacts or conventions, therefore, he understands those which can only be made by the supreme government or some public governor; by which character they differ, not only from the contracts of private persons, but from the contracts of kings about their private concerns. For though causes of war arise from the latter also, they

\* Mr Wheaton adopts the term *Sponsions*, exactly in the sense in which Grotius uses it in this Chapter, as denoting engagements made without full authority. *International Law*, Part III. Chap. 11, § 3. (1836).

exemplum est: *quoties inter se duces belli quædam pacis-cuntur*; quod secundum. Publicas ergo conventiones eas intelligit, quæ nisi jure imperii majoris aut minoris fieri nequeunt, qua nota differunt non tantum a contractibus privatorum, sed et a contractibus regum circa negotia privata. Quanquam ex privatis quoque istis belli causa nasci solet, frequentius tamen ex publicis. Ideo postquam de conventionibus generaliter a nobis tractata sunt satis multa, quædam addenda sunt quæ ad excellentiorem hanc speciem pertineant.

II. Publicas has conventiones, quas Græci *συνθήκας* vocant, dividere possumus in federa, sponsiones, pactiones alias.

III. 1 De federum et sponzionum discrimine adiri potest Livius libro ix. ubi recte nos docet federa esse quæ fiunt jussu <sup>Cap. 5.</sup> summæ potestatis, et in quibus ipse populus iræ divinæ obstringitur si minus stetur dictis. Ea apud Romanos peragi per feciales solebant addito patre patrato. Sponsio autem est, ubi hi qui a potestate summa mandatum ejus rei non habent aliquid promittunt, quod illam proprie tangit. Apud Sallustium legimus: *Senatus uti par erat decrevit, suo atque Bell. Ju-  
populi injussu nullum potuisse fedus fieri.* Hieronymus <sup>gurth. c. 43.</sup> Syracusarum rex cum Annibale, ut narrat Livius, societatem <sup>Lib. xxiv. 6.</sup> fecerat: at postea Carthaginem misit ad fedus ex societate faciendum. Quare <sup>a</sup>quod apud Senecam patrem est: *Imperator fedus percussit, videtur populus percussisse Romanus, et federe continetur*: ad antiquos eos pertinet, qui speciale ejus rei mandatum acceperant. At <sup>b</sup>in regnis, regum est fedus facere. Euripides *Supplicibus* (vers. 1188, et seqq.):

sequentibus. Servius ad illud 11. *Aeneidos* (vers. 161):

Servataque servos  
Troja fidem;

*Quia quod rex promittit videtur respublica promittere. Et ubi Aeneas singulari certamine pugnaturus prius cum Latino fedus facit; Turnum, ait, non in-*

proceed more commonly from public questions. Therefore, since we have discussed many points with regard to compacts in general, we must add some remarks belonging to this more eminent kind of compact.

II. These public agreements we may divide into Public Treaties, Sponsions, and other Compacts\*.

III. 1 With regard to the difference of Public Treaties (*Federa*) and Conventions made on personal responsibility (*Sponsiones*), we may take Livy's view, in which he says that *federa* are treaties made by

\* See E. M. 1124.

Τόνδε δ' ὅμινοις χρεών  
Ἄδραστον οὐτος κύριος τύραννος ἐν  
Πάσης ὑπὲρ γῆς Δαναίδων ὀρκωτομεῖν.

Adrastum hunc opus  
Jurare: namque is jus habet regni potens  
Ut civitatem federe obstringat suo.

Legendum enim ibi, ut diximus, ὀρκωτομεῖν, <sup>2</sup> non ὀρκωτομεῖ.

<sup>Lib. v. 49.</sup> 2 Sicut autem magistratus populum non obligant, ita nec minor pars populi: quod pro Romanis est adversus Gallos Senonas: <sup>3</sup> nam major pars populi erat apud Dictatorem Camillum; bifariam autem, ut apud Gellium est, cum populo agi non potest.

3 Sed ubi qui jus populi non habent, de eo quod populi est spoponderunt, videamus in quid teneantur. Putet forte aliquis hoc casu sponsores fidem liberasse, si operam omnem dedissent, ut id quod spoponderunt fieret, secundum ea quae de promisso tertii facto <sup>4</sup> supra diximus: sed negotii hujus, cui

ducit jurantem, quia presente rege non habet potestatem. (In Zn. xi. 212.)

<sup>5</sup> Ita quidem legitur in omnibus Edd. istius Operis: sed pro voce illa, Lingua Graeca ignota, voluit scribere Auctor ὀρκωμοτεῖν et ὀρκωμοτεῖ, ut habent

omnes Editiones Euripidis. Ceterum emendatio illa fuit diligentissimum Barnesium, qui alias de ea aliquid dicere non omisisset. J. B.

<sup>6</sup> Non tenebantur Galli scire, Camillum Dictatorem creatum fuisse, neque

the sovereign power of the State, in which the people is liable to the Divine wrath if it do not make good its engagements. Among the Romans they were formally made by the *Feciales*, with the *Pater Patratus* at their head. *Sponsions* is the term which we may use when persons not having a commission from the Supreme Authority make any engagement which properly touches that authority. Sallust says, *The Senate, as was to be expected, decreed that no Treaty (fœdus) could be made without its direction and that of the people.* Hieronymus, king of Syracuse, made a Convention of alliance with Annibal; but afterwards sent to Carthage to convert the Convention into a Treaty. So that when Seneca says, *The Treaty made by the General was held made by the People*, he must mean the generals of the old time, who had such a commission. In kingdoms, it is the king's office to make Treaties. See Euripides.

2 As a Magistrate's acts do not bind the People, so neither do those of the smaller part of the people: which justifies the Romans in breaking their convention with the Galli Senones; for the greater part of the people was with the Dictator Camillus; and as Gellius says, the People cannot be treated with in two bodies.

3 But when they who have not authority from the people have

contractus inest, natura obligationem multo strictiorem desiderat. Nam qui contrahendo aliquid de suo dat, aut promittit, is vicissim præstari re ipsa sibi aliquid vult; unde et jure civili, quod facti alieni promissiones repudiat, promissio tamen ratam rem haberi ad id quod interest obstringit.

IV. Federa Menippus regis Antiochi ad Romanos Legatus, referente <sup>d</sup>Livio, magis ex usu suo quam ex præscripto <sup>Lib. xxxiv.  
57.</sup> artis ita divisit, ut diceret tria esse eorum federum, quæ inter se paciserentur reges civitatesque, genera: unum cum bello victis dicerentur leges, quo in genere quid victum habere, quo mulctari eum vellet, victoris esse arbitrium: alterum, cum pares bello æquo federe in pacem atque amicitiam venirent: tunc repeti reddique per conventionem res, et si quarum turbata bello possessio sit, eas aut ex formula juris antiqui, aut ex partis utriusque commodo componi: tertium esse genus, cum qui hostes nunquam fuerint ad amicitiam sociali federe inter se jungendam coēant: quos nec dicere leges, nec accipere.

inquirere, major an minor pars Populi  
Capitolio includeretur: tum ibi Senatum,  
civium partem augustiorem, videbant.  
Plura diximus in Notis nostris Gallicis.  
*J. B.*

<sup>c</sup> *Supra diximus*] Hoc lib. c. xi.  
§ 22.  
<sup>d</sup> *Livio*] Adde Diodorum Siculum  
Exc. leg. iv. (collect. a Fulvio Ursino,  
pag. 315.)

made a convention respecting something which belongs to the rights of the people, let us see to what they are bound. It may be thought perhaps that, in this case, the party who made the convention have performed their engagement, if they have done all that was possible for them, that the terms of the convention on their part should be fulfilled; according to what we have said in speaking of promises. But the nature of these affairs, which involve a contract and not a mere promise, requires a much stricter obligation. For he who in a contract gives anything of his own, or promises it, expects something to be done for him by the other side: whence by the Civil Law also, which repudiates promises for the acts of others, yet a promise of the agent binds and is valid so far as he is concerned.

IV. In Livy, Menippus, rather for his purpose than scientifically, divides Treaties between Kings and States into three kinds; treaties of a conqueror in war with the conquered, and in these the terms depend on the will of the victor: treaties of peace between parties who end a war with equal success; and here the terms are equal, and possessions which had been disturbed by war are restored by agreement; and these treaties are constructed either on the ancient forms, or according to the convenience of the parties: and the third kind, when those who have never been enemies make a treaty of

V. 1 At nobis accuratius instituenda partitio est, ut primum dicamus federa alia idein constituere, quod juris est naturalis, alia aliquid ei adjicere. <sup>4</sup>Prioris generis federa non tantum fieri solent inter hostes qui a bello discedunt, sed olim et fiebant saepe, et aliquo modo erant necessaria inter eos qui ante nihil contraxissent: id inde ortum, quod regula illa juris naturalis, cognitionem inter homines quandam esse a natura, ac proinde nefas esse alterum ab altero laedi, ut olim ante diluvium, ita rursus aliquo post diluvium tempore malis moribus esset oblitterata, <sup>5</sup>ita ut latrocinar et praedas agere in externos, nullo bello indicto, pro licto haberetur; quod Σκυθισμὸν vocat Epiphanius.

*Præf. adv.  
Hær. et Lib. I.  
p. 4. et seqq.*

L. ult. D. de colleg.  
Lib. xliii. 3.

2 Hinc illa 'apud Homerum, an praedones estis? amica interrogatio, <sup>6</sup>cujus et Thucydides meminit, et in Solonis lege veteri collegia ἐπὶ λείαν ἐρχομένων' quippe, ut Justinus ait, ad Tarquinii tempora latrocinium maris gloria habebatur: et illud in Romano jure, ut si cum gente aliqua neque amici-

<sup>4</sup> Confer PUFENDORFUM, *De Jure Nat. et Gent.* Lib. viii. cap. 10. *J. B.*

<sup>5</sup> *Ita ut latrocinar et praedas agere in externos, nullo bello indicto, pro licto haberetur]* Cæsar de Germanis, (*Bell. Gall.* vi. 23.) *Latrocinia nullam habent infamiam quæ extra fines cuiusve civitatis sunt.* Accedit Testis Tacitus de *Moribus Germanicæ*, (cap. 14 et 26) et

Saxo libro xiv. et alibi. Idem de Tyrhenis scriptum est Servio ad viii. 429. et x. *Æneidos*, et de aliis gentibus ad primum *Æneidos*. Diodoro Siculo (Lib. v. cap. 34) de *Lusitanis*: quicum Plutarchus consentit Mario: τὸ λυστεῖν οὐπώ τότε τῶν Ἰβήρων οὐχὶ κάλλιστον γῆγουμένων ad id tempus Hispanis latrocinari inter pulcherrima habebatur.

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friendship and alliance; neither party giving and neither receiving the law.

V. 1 We must make a more accurate division. We say then that some treaties establish that which is conformable to Natural Law; others add something to it. Treaties of the former kind are not only commonly made by hostile parties ending a war, but formerly were both frequent, and in a certain way necessary, between those who had before had nothing to do with each other. Which arose from this, that the rule of Natural Law, that there is a certain natural relationship among men, and that therefore it is unlawful for one man to harm another, as it was obliterated by vicious habits before the deluge, so was it again after the deluge: so that robbery and plunder of strangers without declaring war, was held lawful: a *Scythism*, as Epiphanius calls it.

2 Hence we have that question in Homer, Are ye Pirates? asked as an inoffensive inquiry, as Thucydides notices: and in an old law of Solon there are mentioned companies of Freebooters; since, as

tiam, neque hospitium, neque fedus amicitiae causa factum habetur, hi hostes quidem non sint: quod autem ex Romano ad eos pervenerat, illorum fiat, et liber homo Romanus ab eis captus servus fiat: idemque sit, si quis inde ad Romanos perveniat: et hoc quoque casu postliminium detur. Sic Coreyrenses olim ante belli Peloponnesiaci tempora hostes Atheniensium non erant, sed nec pacem cum illis nec inducias habebant, ut ex oratione Corinthiorum apud Thucydidem <sup>Liber. I. 40.</sup> appareret. De Boccho Sallustius: *nobis neque bello neque <sub>Bell. Jug. c. 22.</sub> pace cognitus.* Hinc in barbaros prædam exercere laudatum Aristoteli, et ipsa vox hostis veteri Latio nihil nisi externum <sup>Polit. I. 8.</sup> significabat.

3 Sub hoc genere comprehendo et federa quibus cavetur, ut utrinque jus hospitii, ut jus commercii sit, quatenus ista sub jure naturali veniunt, qua de re egimus alibi. Utitur hoc discrimine Arco, in oratione ad Achæos apud Livium, ubi <sup>Liv. XII. 24.</sup> non de societate ait quæri, sed de commercio præbendi repe-

(Pag. 408.) Simile est quod Judæi  
damnum datum ei qui nec Judæus fit,  
nec Judæus federatus, sarcendum ne-  
gant. [Vide Baba Kama, cap. i. § 2.  
pag. 13. Ed. Constantini l'Empereur.  
J. B.]

<sup>1</sup> *Apud Homerum] Odysssea γ. ubi*  
Scholiastes: *οὐκ ἀδοξον ἦν παρὰ τοῖς*  
*παλαιοῖς τὸ ληστεύειν, ἀλλ’ εὔδοξον.*

*Latrocinari apud antiquos non tantum*  
*infamia carebat, sed insuper gloriosum*  
*ducebatur.* (Ad vers. 71.)

*εἰ Cujus et Thucydides meminit] Lib-*  
*bro I. additique: οὐκ ἔχοντός πω αἰσχύ-*  
*νην τούτου τοῦ ἑργου, φέροντος δέ τι*  
*καὶ δόξης μᾶλλον· nondum infamiam*  
*habebat id vitæ genus, quin potius laudi*  
*tribuebatur. (Cap. 5.)*

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Justin says, up to the time of Tarquin, Sea Rovers were objects of admiration: and again, in the old Roman law, if there be any nation with which the Romans have neither friendship, nor friendly intercourse, nor alliance, they are not enemies indeed; but that what belonging to the Romans goes into their power is theirs, and a free Roman taken by them becomes a captive; and the same if any come from them to the Romans. Thus the Corcyreans, before the Peloponnesian war, were not enemies of the Athenians, but had neither peace nor truce with them, as appears by the oration of the Corinthians in Thucydides. Sallust says of Bocchus, *not known to us either in war or in peace.* Hence Aristotle praises those who plunder barbarians: and the old Latin word *hostis* meant only stranger.

3 In this class are comprehended treaties in which it is provided that there shall be on both sides the right of hospitality and of intercourse, so far as they come under Natural Law, of which we have treated elsewhere. This distinction is referred to by Arcus in Livy, where he says, that the question is not concerning alliance but inter-

tendique juris: nempe ne servis Macedonum apud se perfugium esset. Hoc genus totum conventionum Graeci stricte εἰρήνην vocant, et opponunt σπονδαῖς, ut tum alibi videre est, tum in oratione Andocidis de pace cum Lacedæmoniis.

Orat. III. p.  
27L

p. 78 L.

VI. 1 Conventiones quæ juri naturæ aliquid adjiciunt, aut æquales sunt, aut inæquales. <sup>b</sup>Æquales sunt quæ utrumque eodem modo se habent ἀ τὸς καὶ τοιωτῶν ἐν ἀμφοτέροις ἔχουσι, ut Isocrates in Panegyrico loquitur: quo illud Virgilii pertinet (*Æn.* xii. 190, 191):

Nec mihi regna peto, paribus sed legibus ambas  
Invictas gentes æterna in federa mittam.

Graeci istas vocant modo συνθήκας simpliciter, modo συνθήκας ἐπὶ τοῦ καὶ ὁμοίᾳ, ut apud Appianum et Xenophontem videre est, has magis proprie σπονδάς, et quatenus minus dignos respiciunt προστάγματα, aut συνθήκας ἐκ τῶν ἐπιταγμάτων, quas <sup>b</sup>Demosthenes in oratione de Rhodiorum libertate fugiendas ait his qui libertatem amant, quia ad servitutem accedant proxime.

2 Utriusque modi federa aut pacis aut societatis alicujus sunt causa. Æqualia pacis, ut quæ de restituendis captiuis,

<sup>b</sup> *Æquales sunt]* Sic Plinius Parthos  
aut cum Scythis ex aequo degere. (*Hist.*  
*Nat.* vi. 25.) Pompeius apud Lucanum  
de eadem Parthorum gente (viii. 232):

Solutus  
Ex aequo me Parthus adit.

<sup>b</sup> Immo locus ille est ISOCRATIS, in

Archidam. En ipsa verba: Καὶ τοι χρῆ τοὺς βουλομένους, ἀλευθέρους εἶναι,  
τὰς μὲν, ἐκ τῶν ἐπιταγμάτων συνθήκας  
φεύγειν, ὡς ἔγγυς δούλειας οὖσας. Pag.  
126 c. Ed. H. Steph. Confudit Auctor,  
ideo quod in laudata Oratione Demosthenis aliiquid legerat de Rhodiis,

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change of rights; namely, that they should not let the Macedonian slaves find a refuge among them. The whole of this class of conventions the Gauls call *Peace*, and oppose to *Truce*. See Andocides.

VI. 1 Conventions which add something to Natural Law are either equal or unequal. Those are equal, which bear equally and commonly on both parties, as Isocrates says. So Virgil. The Greeks distinguish them from Unequal Compacts and Conventions of Command, which are less dignified, and, as Demosthenes says, to be avoided by those who love liberty, as approaching to servitude.

2 Conventions of both kinds are made for peace or some alliance: equal treaties of peace are those which stipulate restitutions of captives and captures on both sides, and mutual security. Equal treaties of alliance either pertain to commerce, or to alliance in war, or to other matters. Equal treaties on the subject of commerce may be various, for instance, that no import duties be paid on either side,

rebus captis, et ad securitatem conveniri solent, qua de re agendum erit infra in belli effectibus et consecutaneis. Aequalia societatis, aut ad commercia pertinent, aut ad belli communitatem, aut ad res alias. Aequales de commerciis pactiones variæ esse possunt, puta utrinque ne vectigal ullum solvatur, quod in vetero erat federe Romanorum et Carthaginiensium, excepto eo quod scribæ et præconi dabatur, aut ne majus solvatur quam in præsens, aut ad certam quantitatatem.

3 Sic et in bellica societate ut auxilia prætentur paria equitum, peditum, navium, sive ad omne bellum, quod Græci <sup>Ιξυμαχίαν</sup> vocant, et explicat Thucydides τοὺς αὐτοὺς ἐχ-<sup>Lib. iii. 73.</sup> θροὺς καὶ φίλους νομίζειν, eosdem hostes et amicos habere: quod et apud Livium sæpe reperias, sive ad tuendos fines duntaxat, quod ἐπιμαχίαν, sive ad certum bellum, aut in certos hostes, aut in omnes quidem, sed exceptis sociis, ut in federe inter Pœnos et Macedonas, quod apud Polybium est; <sup>Lib. vii. 2.</sup> quomodo et Rhodii Antigono et Demetrio per fedus auxilia <sup>Plut. in Demet. p. 899 A.</sup> promiserunt in hostes quosvis, excepto Ptolemaeo. Potest, ut diximus, æquale fedus et ad res alias pertinere, <sup>k</sup>ut ne in

quod hoc tendit, quamquam alio modo,  
pag. 79 c. Ed. Basil. 1572. Error  
autem hoc translatus e Mari Libero,  
cap. 13. init. ubi dudum locus ita ab  
Auctore landatus fuerat. J. B.

<sup>1</sup> Ιξυμαχίαν vocant] Veteres ὄμαιχ-  
μιαν. Zosimus, Lib. v. c. 42. [Vox  
autem ἐπιμαχία reperitur eo sensu, quo

Auctor noster exponit, apud Thucyd. i.  
44. Adde de his omnibus Andr. Dounæl  
Praelection. in Demosthen. Orat. Phi-  
lipp. De Pace, pag. 135, et segg. J. B.]  
<sup>k</sup> Ut ne in confinio alterius alter ar-  
ces habeat] Exemplum vide apud Pro-  
copium Persicorum i. (Cap. 2.)

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which was the agreement in the old treaty of the Romans and Carthaginians, except what was paid to the harbour-master and the public crier; or that no duties be paid greater than at present, or greater than a certain rate.

3 In alliances for war, the terms may be, that each side supply equal forces of infantry, cavalry, and ships: either for the whole war, which the Greeks called *Symmachia*, and which Thucydides explains to have the same friends and the same enemies: as also in Livy; or for defensive purposes only, which was *Epimachia*; or for a certain war, or against certain enemies, or against all, excepting allies, as in the league between the Carthaginians and Macedonians, in Polybius; so also the Rhodians by treaty promised aid to Antigonus and Demetrius against all, except Ptolemy.

An equal treaty may also, as we have said, pertain to other matters; as that neither shall have fortresses within the boundaries of the other;

confinio alterius alter arces habeat, ne subditos alterius alter defendat, ne iter alterius hosti præbeat.

VII. 1 Ex æqualibus qualia sint inæqualia facile est intelligi. Promittuntur autem inæqualia aut ex parte digniori, aut ex minus digna. Ex parte digniori, ut si quis auxilia promittat nec restipuletur, aut majora promittat: Ex parte indigniori inæqualia, aut ut Isocrates dicto Panegyrico loquitur, τὰ τοὺς ἐτέρους ἐλαττοῦντα παρὰ τὸ δίκαιον, sunt ea quæ diximus προστάγματα aut ἐπιτάγματα vocari. Et hæc ipsa aut cum imminutione sunt imperii, aut sine ejus imminutione.

LIV. XXX. 37.

CAP. 20.

2 Cum imminutione imperii, ut in secundo federe Carthaginensium cum Romanis, ne cui Carthaginenses bellum facerent, injussu populi Romani. Ab eo tempore, ut Appianus loquitur, Καρχηδόνιοι Ὦρμαίοις υπήκοουν ἐνσπουδοί, Carthaginenses Romanis ex federe morem gerebant. Potest addi huic generi deditio conditionata, nisi quod illa non imminutionem, sed translationem totius imperii continet, qua de re diximus alibi. Talem autem conventionem federis nomine et alibi Livius appellat, ut libro IX. *Theates Apuli impetraverunt ut fedus daretur, neque ut æquo tamen federe, sed ut in ditione populi Romani essent.*

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that neither shall defend the subjects of the other; that neither shall give passage to the enemies of the other.

VII. 1 From the explanation of what are equal conventions, it is easily understood what are unequal. Unusual Treaties are either proposed by the superior party, or by the inferior. By the superior, as if he promises assistance without any reciprocal stipulation: by the inferior, when there is an inferiority of claim, are what we have spoken of as Conventions of Command. And these are either without infringement of the sovereignty of the inferior, or such as infringe it.

2 Such as infringe the sovereignty, as in the second treaty of the Romans with the Carthaginians, that the latter should not make war without the permission of Rome: from that time, as Appian says, the Carthaginians were by treaty submiss to Rome.

To this class we might add surrender on conditions, except that this contains, not an infringement, but a transfer of the sovereignty, of which we have spoken elsewhere. Such a convention Livy calls *fedus* in the case of the Apulian Theates.

3 In unequal treaties made without infringement of the sovereignty, the burthens imposed on the inferior are either transitory or

3 Sine imminutione imperii onera aut transitoria sunt, aut manentia. Transitoria, de solvendo stipendio, de mœniibus diruendis, ut locis quibusdam decedatur; ut dentur ob-sides, elephanti, naves. Manentia, ut de imperio ac majestate comiter colenda, cuius federis quæ sit vis alibi diximus. Huic proximum est ut hostes et amici habeantur quos velit partium altera: ne cui exercitui, cui cum altero bellum sit, per fines transitus commatusve detur. Tum illa minora, ne arces certis locis ædificare, ne exercitum ducere, ne naves habere ultra numerum definitum, ne urbem condere, ne navigare, ne militem certis locis conscribere liceat: ne socios oppugnare: ne commeatu hostes juvare: ne recipere eos qui aliunde veniunt: ut federa prius facta cum aliis dirimantur: quorum omnium exempla apud Polybium, Livium, et alias videre est.

4 Solent autem federa inæqualia contrahi, non tantum inter victores et victos, ut Menippus censebat, sed et inter Apud Liv.  
potentiores et impotentiores, etiam qui bello inter se experti  
<sup>utbi sup.</sup>  
non sunt.

VIII. De federibus frequens est quæstio, licetene inean-tur cum his qui a vera Religione alieni sunt: quæ res in jure naturæ dubitationem non habet. Nam id jus ita omnibus

permanent: Transitory, as the payment of a subsidy, the dismantling of strong towns, the withdrawing from certain places; the giving up of hostages, ships, elephants: Permanent, as the paying deference to the authority and majesty of the superior; of which engagement I have elsewhere spoken. Nearly of the same kind is the engagement to have for enemies and for friends those whom the other party shall prescribe; not giving passage or provisions to a party with whom the other is at war. And the smaller matters; not building forts in certain places, not having a moveable army, not having ships beyond a certain number, not founding a city; not navigating; not raising soldiers in certain places, not attacking allies, not supplying provisions to the enemy; rescinding treaties before made with other parties: of all which we may find examples in Polybius, Livy, and others.

4 Unequal treaties may be made not only between the conqueror and the conquered, as Menippus thought, but between the more and the less powerful who have never been at war.

VIII. It is often made a question whether it is lawful to make treaties with those who are strangers to the true Religion; which point in Natural Law is open to no doubt. For that Law is so far

hominibus commune est, ut Religionis discriminem non admittat. Sed de jure divino quæritur, ex quo hanc quæstionem tractant <sup>1</sup>non Theologi tantum, sed et Jurisconsultorum nonnulli,  
Thom. 2. 2.  
q. 10. art. 9.  
Oldr. cons. 71.  
Decian. iii.  
cons. 20.

IX. 1 Videamus primum de jure divino veteri, acturi  
 deinde de novo. Fedus, non nocendi causa, cum alienis a  
 Religione contrahere ante Mosis legem licuit. Exemplum est  
Gen. xxxi. 44. in federe Jacobi cum Labane: ut jam de Abimeleco nihil  
Gen. xxvi. 38. dicam, quando non satis constat eum fuisse idololatram.  
<sup>29.</sup> Neque id lex per Mosem data mutavit. Exemplo sint  
Deut. xxiii. 7. *Egyptii*, haud dubie tunc idololatræ. Hos tamen aversari  
 vetantur *Hebræi*. Excipiendi sunt populi septem divina sententia  
 damnati, cuius sententiae executores erant delegati  
Deut. vii. 1.  
et seqq. Israëlitæ; nam his in idolatria perstantibus, et imperium  
 detrectantibus, parcere vetantur, quibus itidem decreto divino  
Deut. xxv. 17. additi sunt Amalecitæ.  
<sup>et seqq.</sup>

2 Federa quoque commerciorum, et quæ his similia ad  
 utilitatem communem, aut alterius partis pertinent, inire cum  
 profanis licet per legem: nihil enim reperitur quod obstet.  
2 Sam. v. 11. Et exempla habemus federum, quæ David et Solomo cum  
 Hiromo Tyriorum rege fecerunt: ac notandum in sacra historia dici fedus hoc a Solomone factum juxta sapientiam quam  
1 Reg. v. 12. Deus ei dederat.

3 Lex quidem Mosis specialiter imperat benefacere popula  
Lev. xix. 18.  
et Deut. xxii. 1. laribus, ἀγαπᾶν τὸν πλησίον· præterea peculiaris victus et  
 morum ratio Judæis præscripta familiarem cum hominibus  
 ceteris consuetudinem vix patiebatur. At hinc non sequitur  
 aut benefacere extraneis non licuisse, aut etiam laudabile id  
 non esse, quod male inde collegit posteriorum magistrorum

<sup>1</sup> Non Theologi tantum] Puta Antoninus, Cajetanus, Toletus, Molina, Valdesius, Malerus.

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common to all men that it recognizes no distinction of Religion. But the question is put on the ground of the Divine Law, and so treated, not only by Theologians but by Jurists, and among them, by Oldradus and Decianus.

IX. 1 First of Divine Law. We have examples of covenants for mutual forbearance, with strangers to true Religion, before the law of Moses, as Jacob with Laban, not to speak of Abimelech. The law of Moses did not change this: for example, the Hebrews are forbidden to treat the Egyptians as enemies. The seven Peoples of

prava interpretatio: unde illud Juvenalis de Judæis, (*Sat. xiv. 103*):

Non monstrare vias eadem nisi sacra colenti.

quo loco exemplum monstrandæ viæ minime molesta neque sumtuosa beneficia indicat quæ ignotis etiam tribuenda Cicero *De Offic. I. 16.* dicit et Seneca. Eodem pertinet Taciti illud de iisdem: *De Benef. iv. 29.* *Hist. v. 5.* *Apud ipsos fides obstinata, misericordia in promptu, ad-* *versus omnes alios hostile odium.* Sic in novi federis historia legimus sæpe, non solitos Judæos convivere συγχρῆσθαι, *Joan. iv. 9.* συνεσθίειν, κολλᾶσθαι, προσέρχεσθαι alienigenis. Et Apollonius Molo Judæis objiciebat, ὅτι μὴ παρεδέχοντο τοὺς ἄλλας πρωκτειλημμένους δόξαις περὶ Θεοῦ, μηδὲ κοινωνεῖν ἔθελον τοῖς καθ' ἑτέραν συνήθειαν βίου ζῆν προαιρουμένοις: *non admitti ab eis qui de Deo sentirent alia,* nec quicquam *ipsis commune esse cum his qui institutis differrent:* Amici Antiochi apud Diodorum Judæos accusant: *Elog. ex Lib. xxxiv. apud Phot.* μόνους ἀπάντων ἔθνων ἀκοινωνήτους εἶναι τῆς πρὸς ἄλλο ἔθνος ἐπιμιξίας, καὶ πολεμίους ὑπολαμβάνειν πάντας: *solos ex omnibus populis insociabiles esse extraneis, ita ut ceteros pro hostibus ducant.* Sequitur de iisdem: μηδενὶ ἄλλῳ ἔθνει τραπέζης κοινωνεῖν τὸ παράπαν, μηδὲ εύνοεῖν, *cum nulla gente alia mensam habere communem, neque bene eos aliis velle.* Mox eis tribuitur μισανθρωπία, odium humani generis. Et apud Philostratum, Tyanensis de Judæis: *Vit. Apol. Tyan. v. 33.* οἱ βίοι ἀμικτον εύροντες, οἰς μήτε κοινῇ πρὸς ἀνθρώπους τράπεζα· *vitæ genus adeo secretum ab humano commercio repererunt, ut ne mensam quidem cum aliis communem habeant.* Sicut et passim Judæis apud Josephum objicitur, τὸ ἀμικτον, τὸ ἀσύμφυλον, η διαίτης ἀμιξία, *insociabilis vendi ratio.*

4 At hunc non esse sensum Christus nos docuit

Canaan are an exception, on account of their obstinate idolatry.

2 Treaties of commerce, and the like, may be made with such persons: so David and Solomon with Hiram king of Tyre.

3 The Law of Moses separates the Jews from the rest of mankind. But that the Jews were not to do good to other nations, was a perverse interpretation of later masters. See Juvenal, Cicero, Seneca, Apollonius Molo, Diodorus, Philostratus, Josephus.

4 This was not Christ's interpretation. Also, see David's intercourse with strangers: and Solomon's.

*Joan. iv. 7.* exemplo suo, cum a Samaritide femina aquam accipere non  
1 Sam. xxvii. etc. recusavit, legis ubique observantissimus. Sed et olim David  
 apud populos irreligiosos perfugium sibi quæsiverat, nusquam

*Ant. viii. 2.* eo nomine reprehensus. Apud Josephum Solomoni templum  
p. 265. dedicanti, et oranti ut Deus ibi etiam alienigenarum preces  
 exaudiret, hæc tribuitur oratio : ημεῖς οὐκ ἀπάνθρωποι τὴν  
 φύσιν ἔσμεν, οὐδὲ ἀλλοτρίως πρὸς τοὺς οὐχ ὁμοφύλους ἔχο-  
 μεν· *non sumus inhumano ingenio neque male affecti erga*  
*extraneos.*

*Jud. xi. 16.* 5 Excipiendi ab hac regula non illi tantum populi quos  
 supra diximus, sed insuper Ammonitæ et Moabitæ, de quibus  
 scriptum est Deut. xxiii. 6. *Non quæres prosperitatem eorum* (ita rectius hoc loco verteris מִלְשׁ quam pacem eorum) *nec bonum eorum ullis diebus tuis unquam.* Quibus verbis federa  
 benefica cum illis populis vetantur, non etiam jus belli conce-  
 ditur : aut certe, quæ Hebræorum quorundam sententia est,  
 vetatur pax ab illis peti, non etiam oblata accipi. Certe jus  
 belli in Ammonitas Hebræis negatur Deut. ii. 19 : neque Jeph-  
 thes arma in eos movit, nisi post tentatas æquæ pacis vias,  
2 Sam. x. neque David nisi atrocibus injuriis laceratus. De societate  
 bellica quæstio superest.

*Gen. xiv.* 6 Ante legem, hanc quoque non illicitam fuisse cum pro-  
 fanis gentibus, exemplo apparet <sup>m</sup>Abrahami, impios Sodomitas  
 bello adjuvantis. Nec lege Mosis quoquam generaliter hac in  
 re mutatum legitur. Atque ita videmus sensisse <sup>n</sup>Asmonæos,  
 legis et peritos et reverentes admodum, ut ex religiosa sappa-

<sup>m</sup> *Abrahami]* Idem cum Escole et  
 Anero fœdus fecit. (Gen. xiv. 13.) Sic  
 et David cum Achi et Naaso, Solomon  
 cum Ægyptiis, Aaa cum Benadado.  
 [Vide 1. Sam. xxvii. 11. Sam. x. 2. 1.  
 Reg. iii. 1. et xv. 19.]

<sup>n</sup> *Asmonæos legis et peritos et reve-  
 rentes admodum]* Laus eorum est in  
 Thargumo Chaldaico, in libris Macca-  
 baicis, in epistola ad Hebreos. Horum

exemplum secuti Imperatores et reges  
 Christiani federa aut cum non Christianis  
 aut cum non sane Christianis fe-  
 cere, Constantinus cum Gothis et Van-  
 dalis, Justinianus cum Longobardis :  
 cum Saracenis, Alanis, Gepidis, Francis,  
 Suevis, Vandalia, Theodosius, Honorius,  
 Leo, Heraclius, Basilius, Isaacius Ange-  
 lus, Paleologus : cum Mauris reges His-  
 panie Alfonsus Hispalensis, Ramirus,

5 Besides the exception of the Peoples of Canaan, the Ammonites and Moabites also are excepted. Beneficial leagues with them are forbidden, but war is not authorized. See the passages.

6 See also the example of Abraham and his league with the king of Sodom. And the Maccabees made leagues with Greeks and Romans.

thi observatione, permissa sola sui tutela, non alio armorum usu, apparet. Et hi tamen cum Lacedæmoniis et Romanis foedus pepigere, approbantibus sacerdotibus et populo; imo <sup>1 Macc. viii.  
et xii.</sup> pro eorum salute sacra publice fecerunt. Quæ vero contra adferuntur, causas habent peculiares.

7 Nam si quos reges aut populos, extra eos qui in lege expressi erant, exosos sibi et infortunio damnatos per Prophetas Deus significasset, eorum tutelam suscipere aut cum iis arma sociare haud dubie nefas erat. Huc illud pertinet Pro-<sup>2 Paral. xix.</sup> ad Josaphatum de rege Israëlis: *Te ne improbo opitulari, et eos diligere qui Deum oderunt?* At ob hoc ipsum exarsit in te Dei ira. Nam infelicem belli exitum Micheas propheta jam ante prædixerat. Et alterius prophetæ ad Amasiam: *Ne ito tecum exercitus Israëitarum: nam ibid. xxv. 7.* non adest Deus Israelitis, ulli inquam Ephraimitarum. Hoc vero non venire ex natura federis, sed ex personæ peculiari quadam qualitate, vel hinc evincitur, quod graviter increpitus est Josaphatus, etiam diris additis, eo nomine quod <sup>ibid. xx. 37.</sup> commercii causa societatem iniisset cum Ochozia rege Israëitarum, similem ei, quam David et Solomo inierant cum Hiramo, quos eo nomine partim non reprehensos, partim laudatos diximus. Nam quod additur Ochoziam impie egisse, debet ad totam ejus vitam referri, ob quam Deus ipsi omnibusque ejus conatus infensus fuerit: quomodo hæc historia explicatur in libro, cui nomen Constitutiones Clementis VI. capite xviii.

Alfonus Castus, Sanctius Castellæ, Ferdinandus cognomine Sanctus: Petrus Legionis rex: Alfonus Castellæ rex prudentissimus: cum Tartaris Rodolphus Habsburgensis. Adi Johannem de Carthagina libro iii. *de Jure Belli Romani Pontificis* c. 1. Julius II. Pontifex Turcis usus.

• *Ad Josaphatum]* Josephus: ητια-  
το τὴν πρὸς Ἀχαθον συμμαχίας ἀνθρω-

*πον δεῖθη καὶ πονηρόν. accusabat eum  
societatis initæ cum Achabo homine im-  
pio ac sclerato.* (*Antiq. Jud. ix. 1.  
§ 1. Edit. Hudz.*)

• *Qui Deum oderunt?* Gratianus Valenti patruo contra Scythas operem pe-  
tenti scripait, *ὡς οὐ δεῖ τῷ ἔχθρῷ τοῦ  
Θεοῦ συμμαχεῖν· fas non esse socialia  
arma jungere cum eo qui Dei sit hostis.*  
Zonaras (Lib. xiii. cap. 17.)

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7 If any kings or peoples were condemned to destruction by God, doubtless it was then unlawful to protect them or to join with them. So 2 Chron. xix. 2, Jehu the prophet says to Jehoshaphat, *Shouldst thou help the ungodly, &c.?* So 2 Chron. xxv. 7 to Amaziah. But this was on account of personal considerations, not the nature of the treaty, as appears by the circumstances: [which see.]

8 Notandum et hoc, pejorem fuisse causam eorum qui a Jacobo orti Deum bene cognitum deseruerant, quam populum extraneorum. Nam in defectores illos ceteri populares armabantur <sup>4</sup>lege quæ exstat Deut. xiii. 13.

9 Est et ubi culpantur federa, ob animi vitium unde procedebant; ita a Propheta reprehensus Asa, quod ad societatem Syri se contulisset Deo diffusus: quod ostenderat cum res Deo sacras ad Syrum mitteret. Sed nempe Rex idem culpatus quod in medicis spem posuisset, non in Deo. Non ergo ex hac historia magis sequitur, per se aut generaliter malum esse societatem contrahere cum talibus quales erant Syri, quam medicos consulere. Multa enim non illicita vitiata

<sup>2</sup> Sam. xxiv.  
<sup>2</sup> Reg. xx. 13.  
Ezra. xxxi. 1.  
1 Reg. iii. 1.

animus, ut censum in Davide, thesaurorum ostensionem in Ezechia. Sic alibi fiducia in Ægyptio posita reprehenditur, cum tamen Solomoni cum Ægyptio affinitatem contrahere licuerit.

<sup>Deut. xxviii.</sup>  
<sup>7.</sup>

10 Quibus et hoc addendum est, Hebræos sub statu legis veteris disertas habuisse promissiones victoriæ si legem observarent, quo minus recurrendum habebant ad humana auxilia. Exstant quidem et apud Solomonem sententiae non paucae, de vitandis consortiis impiorum. Sed hæc prudentiæ monita sunt, non legis præcepta: et illa ipsa monita, ut moralia pleraque, plurimas habent exceptiones.

X. 1 Lex autem Evangelii nihil hac in parte mutavit: imo magis etiam favet federibus, quibus hi, qui a Religione alieni sunt, in causa justa sublevantur, quia beneficentiam in quosvis homines, data occasione, non liberam modo reliquit et laudabilem, sed et sub præcepto posuit. Nam Dei exemplo, qui solem oriri facit bonis et malis, et pluvia utrosque humecat, jubemur nullum hominum genus a beneficiis nostris exclu-

<sup>4</sup> *Lege quæ exstat* Deut. xiii. 13.] Adde exemplum Josue c. xxii.

8 Observe that the case was worse with the Ten Tribes, who, though descended from Jacob, had deserted God, than with others.

9 Sometimes also treaties are condemned on account of the bad motive from which they proceeded. Thus, 2 Chron. xvi. 2, Asa's league with the Syrians. So other kings sinned. And trust in Egypt is condemned; but Solomon made a league with Egypt.

10 Moreover the Hebrews had a promise of success if they obeyed the law, and so did not need human aid. Solomon's precepts in the Proverbs about shunning the fellowship of the wicked

*Vict. de Indis.*  
*select. 1. n.*  
*18. et 17.*  
*Franc. Artus*  
*de Bell. n.*  
*192.*  
*Cajet. 2. 2.*  
*q. 40. art. 1.*  
*Molin. tract.*  
*11. disp. 112.*  
*Math. v. 45.*

dere. Bene Tertullianus: *Quamdiu intra Israelem erat sacramentum, merito in solos fratres misericordiam mandabat. At ubi Christo dedit gentes hereditatem et possessionem terminos terrae, et cœpit expungi quod dictum est per Osee: Non populus meus populus meus, et non misericordiam consecuta misericordiam consecuta, Natio scilicet; exinde Christus in omnes legem fratrnæ benititatis extendit, neminem excludens in miseratione, sicut in vocatione.*

2 Quæ accipi oportet salva gradus differentia, ut in omnes simus benefici, præcipue tamen in religionis consortes. In *Gal. vi. 10.* Clementis constitutionibus legimus: *πᾶσιν οὖν δίκαιον διδόναι Lib. vii. 11.* ἐξ οἰκείων πόνων προτιμητέον δὲ τὸν ἀγίον. *Omnibus largiendum de nostra opera: sed ita ut sanctorum potior habeatur ratio.* Perfecta liberalitas, inquit Ambrosius, *fide, off. i. 30.* causa, loco, tempore commendatur, ut primum opereris circa domesticos fidei. Simile est illud Aristotelis: *οὐ γὰρ οὐδείς Nic. iv. 52.* προσήκει συνήθων καὶ θύνειν φροντίζειν. Neque enim par est aequalē curam subiri pro externis et pro amicis.

3 Convictus etiam familiaris cum hominibus, qui alieni sunt a Religione, non prohibetur: ac ne cum illis quidem, quorum pejor causa est, et qui a disciplina Christianæ regula deficiunt, omne interdicitur commercium, sed familiare extra necessitatem, non etiam quod emendandis ipsis spem præbet. *2 Thess. iii. 15.* Illud vero quod apud Paulum est, *Ne jugum ducite cum alienis a fide: quod enim consortium est justitiae cum ini- guitate, aut quæ commixtio est luci cum tenebris, aut quæ concordia est Christo cum Satana, aut quæ pars credenti cum non credente?* ad eos pertinet qui in idoliis convivabantur, atque ita aut idololatriam committebant, aut certe committentium speciem præbebant. Ostendunt sequentia: *Quæ consensio templo Dei cum idolis?* similia illis quæ in priore ad *1 Cor. x. 21.*

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belong to private prudence, not to public policy, and admit of many exceptions.

X. 1 The Gospel changed nothing in this matter: it rather favours conventions with all men that we may do them good: as God makes his sun to rise on the just and on the unjust. So Tertullian.

2 Which must be taken with a difference, that we are to do good to all, but specially to those who are our partakers in religion. See the Clementine Constitutions, Ambrose, Aristotle.

3 Familiar intercourse is not forbidden with strangers to Religion, nor even those who have gone back from religion; but only unneces-

Corinthios eosdem : *Non potestis fieri participes mensæ Domini et mensæ dæmoniorum.*

4 Neque ab eo quod subeunda sponte non sunt profanorum imperia, nec conjugia cum eis contrahenda, recte procedet argumentum. Nam in utroque hoc casu apparet majus periculum, aut certe plus difficultatis injici veræ Religionis usui. Adde quod magis perpetua sunt ista vincula : et in matrimonio liberior electio, cum federa ex temporum et locorum occasione sumenda sint. Sicut autem benefacere profanis malum non est, ita nec opem eorum implorare, sicut Cæsaris et Tribuni auxilium Paulus invocavit.

Sylv. Verk.  
Bell. I. n. 2  
condit. 2.  
Pan. in c.  
Quod sup. de  
vota.

Apud Athen.  
vii. 13. p. 229,  
300.

XI. 1 Nulla ergo hic intrinseca aut universalis est pravitas, sed <sup>1</sup>ex circumstantiis aestimanda. Cavendum enim nemnia commixtio contagium adferat infirmis ; quam ad rem utile erit sedes distingui, sicut Israëlitæ seorsim ab Ægyptiis habitarunt. Neque enim ratione caret illud Anaxandridæ :

Οὐκ ἀν δυναίμην συμμαχεῖν ὑμῖν ἔγει.  
Οὐθὲ οἱ τρόποι γὰρ δύνονται, οὐθὲ οἱ νόμοι  
Ἡμᾶς ἀπ' ἀλλήλων δὲ διέχουσι πολύ.

Ego esse vester non queam commilito,  
Quando nec leges, nec mores consentiunt,  
Sed multis inter se intervallis discrepant.

<sup>1</sup> Ex circumstantiis aestimanda] Vide orationem Phartazzo ad Lazos apud A. gathiam III. (cap. 5.) Saxo libro IX. in verbis Ludovici regis Francorum ad Haraldum : *Nullam posse animorum in-* tervenire concordiam dissona sacra complexis : quamobrem petitorem opis pri- mum religionis contubernio opus habere, neque magnorum operum consortes ex- istere posse, quos superne venerationis

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sary familiarity. St Paul's warnings, 2 Cor. vi. 14, &c. refer to idolatry, as appears by what follows, and by 1 Cor. i. 21.

4 Nor does the proof follow, because we are not willingly to come under the authority of the impious, or to contract marriage with them. For such steps produce much more danger to religion, and are more permanent, and more free ; while treaties depend on occasion of time and place. And as we may benefit the profane, so we may ask their help, as Paul claimed the help of Cæsar and of the chief Centurion.

XI. 1 Hence in an alliance with those of a false religion, there is no inherent or universal pravity: the case is to be judged by the circumstances. But care is to be had that too much mixture with them do not taint the weak. For which purpose, separate habitation is good, like that of the Israelites in Egypt. So Anaxandrides. And to this pertain what we have said of Jews and Christians serving as

Quo pertinent et ea quæ alibi attulimus de religione Judæo-  
rum et Christianorum in commilitio cum paganis.

2 Sed et si ex societate tali profanæ opes magnum sint  
habituræ incrementum, abstinentia erit extra summam ne-  
cessitatem: In qua locum habet, quod in simili re dixit Thu-  
cydides: ἀνεπίφθονον δέ, ὅσοι ὥσπερ καὶ ήμεῖς ὑπὸ τῶν Lib. I. 2. § 2.  
Ἀθηναίων ἐπιβούλευμέθα, μὴ Ἑλληνας μόνον, ἀλλὰ καὶ  
βαρβάρους, προσλαβόντας διασωθῆναι. His qui insidiis  
impetuntur, ut nos ab Atheniensibus, invidia fieri non debet  
si salutem querunt non Græcorum modo sed et barbarorum  
auxiliis. Non enim jus quodvis sufficit ad id committendum,  
quod religioni, si non directe, indirecete tamen nocitum puto-  
tur. Querendum enim primo loco est regnum cœleste, id Matt. vi. 33.  
est, Evangelii propagatio.

3 Optandum esset, ut multi hodie principes ac populi in  
animum admitterent liberam et piam vocem Fulconis Archi-  
episcopi quondam Remensis, Carolum Simplicem sic admonen-  
tis: *Quis non expavescat vos "inimicorum Dei amicitiam*  
*velle, ac in cladem et ruinam nominis Christiani pagana*  
*arma et fædera suscipere detestanda?* Nihil enim distat  
utrum quis se paganis societ, an abnegato Deo idola colat.  
Exstat apud Arrianum dictum Alexandri: ἀδικεῖν μεγάλα Lib. I. 17.  
τοὺς στρατευομένους ἐναντία τῇ Ἑλλαδὶ παρὰ τοῖς βαρβά-

*formula disparasset.* (Lib. ix. pag. 158.  
Edit. Wech. 1576.)

\* *Inimicorum Dei amicitiam velle]*  
Exemplum in Mancata apud Nicetam

rebus Isaaci Angeli Lib. II. cap. 3. Præ-  
dicatur pietas Emanuelis ducis Sabau-

diæ, qui Cyprus ope Turcæ recuperare  
cum posset, noluit.

Prod. I. iv.  
Hist. Rem.  
c. 6.

soldiers with heathens.

2 But if the strength of the profane is likely thus to be much increased, we must abstain from such alliances, except in case of necessity: such as Thucydides speaks of. [See.] For it is not mere right which justifies men in doing what may indirectly harm religion. We must seek first the kingdom of God, that is, the propagation of the Gospel.

3 It were to be wished that many princes and peoples would lay to heart that liberal and pious saying of Fulk, Archbishop of Rheims, who thus admonished Charles the Simple: *Who is not alarmed when you seek the friendship of the enemies of God; and invite the co-operation and the arms of pagans for the calamity and ruin of the Christian name?* It makes no difference whether any one joins himself with pagans, or denies God and worships idols. There is in Arrian a saying of Alex-

*pois, παρὰ τὰ δόγματα τὰ τῶν Ἑλλήνων graviter eos delinquare qui adversum Græcos Barbaris militarent, contra Græcorum jura.*

<sup>1 Cor. xii. 18,</sup> <sup>sc.</sup> XII. Illud hic addam, cum omnes Christiani unius corporis membra sint, quæ jubentur alia aliorum dolores ac mala persentiscere, sicut id ad singulos pertinet, ita et ad populos qua populi sunt, et ad reges qua reges pertinere. Neque enim pro se quisque tantum, sed et pro mandata sibi potestate servire Christo debet. Hoc autem præstare reges et populi non possunt, grassante armis hoste impio, <sup>‘</sup>nisi alii aliis auxilio

sint : quod commode fieri nequit, nisi fedus eo nomine ineatur : quod fedus jam olim initum fuit, et princeps ejus creatus consensu communis Romanus Imperator. Debent ergo Christiani omnes ad causam hanc communem pro virium modo viros aut pecunias conferre : quod quominus faciant non video quomodo possint excusari, nisi si qui bello inevitabili, aut non dissimili malo domi distinentur.

XIII. 1 Solet sæpe et illa incidere quæstio, si plures bellum gerant, utri potius opem ferre debeat qui utriusque est federatus. Hic primum sciendum est, quod et supra diximus, ad

<sup>t</sup> *Nisi alii auxilio sint*] Ad hanc rem vide Marianam libro xxx. cap. 23. Parutam libro iv. Bizarum vii. et xii.

<sup>u</sup> *Qui federatorum justam habet belli*

*causam præferendus*] Vide infra libro ii. c. xxv. § 4. In fidelitate Feudali dicitur: *Et si scivero velle te aliquem juste offendere, et inde generaliter vel specialiter fueris requisitus, meum tibi, sicut potero,*

ander, that *Those grievously offend who enter the service of Barbarians to fight against Greeks and Grecian rights.*

XII. Add that all Christians are members of one body ; are commanded to bear each other's sufferings and sorrows : and as this applies to individuals, so does it to peoples, as peoples, and to kings, as kings. Each must serve Christ according to the power given him. But this they cannot do, when the infidel is powerful, except they help each other : and this cannot well be done except a general league be made with that view. Such a league has been made, and the head of it created by common consent Roman Emperor\*. Therefore all Christians ought to aid in this cause according to their power with men or money : nor do I see how they can be excused, except they be detained at home by an inevitable war or some similar evil.

XIII. 1 The question often arises, if several parties carry on

\* Frederic III., A.D. 1461, says Gronovius; and refers to *Boecleri. Disputatio de Passagiis.*

injusta bella nullam esse obligationem. Quare "qui federatorum justam habet belli causam præferendus, si cum extraneo res sit. Etiam si cum alio federato : Sic oratione de Megalopoli ostendit Demosthenes, Messeniis sociis contra Lacedæmonios item <sup>p. 83 c.</sup> item socios opem ferri ab Atheniensibus debere, si ab his incipiat injuria. Sed id ita verum ; nisi convenerit hoc quoque ne adversus eum auxilia mittere liceat. In pactione Hannibal cum Macedonibus erat : *Hostium hostes erimus, exceptis regibus, civitatibus, et portibus quibuscum fedus nobis et amicitia est.*

2 Quod si federati inter se committantur causis utrinque injustis, quod accidere potest, utraque parte abstinendum crit. Sic in Leuctrica Aristidis quinta dicitur, *εἰ μὲν ἐπ' ἄλλους ἔκάλουν, ραδίως ἄν. ἐπ' ἀλλήλους δὲ καλούντων, οὐκ ἐθέλειν παρεῖναι· "si quidem in alios auxilium poscerent, facile esse negotium : sin sociorum alter in alterum, nolle se misceri.*

3 Quod si federati in alios bellent justa quisque de causa, si utrique auxilia mitti possunt, puta in milite aut pecunia,mittenda erunt, ut fit circa creditores personales. At si ipsius qui promisit præsentia requiritur, quæ individua est, ratio postulat <sup>x</sup>ut præferatur cum quo antiquius est fedus ; quod

*prestabo auxilium. (Feud. II. 7.)*

<sup>6</sup> Locus est Tom. II. pag. 220. Ed. Paul. Steph. sed ubi, si expendatur se ries orationis, manifesto patebit agi, non de justitia aut injustitia belli, sed de eo

quod prudentia postulabat. J. B.

<sup>x</sup> Ut præferatur cum quo antiquius est fedus] Vide de Feudis, Lib. IV. cap. 31. [Secundum divisionem Cujacii : at Lib. II. tit. 28. in fin. Ed. Vulg.]

a war, to which of two in preference ought he to give assistance who is under agreement with both. This is first to be understood, as we have said above, that no one is bound to unjust wars. Therefore that one of the allies who has a just cause is to be preferred, if the transaction is with a stranger: and also if it be with another of the allies. Thus Demosthenes, in the oration concerning Megalopolis, shews that the Athenians ought to assist the Messenians, who are their allies, against the Lacedæmonians, who are also their allies, if the wrong be on the side of the latter. In the treaty of Hannibal with the Macedonians, it stood, *We will be the enemies of your enemies, except the kings, states and ports with which we are in league and friendship.*

2 If two allies quarrel, being both in the wrong, which may happen, we are to take part on neither side. So Aristides.

3 But if two allies make war on others for just cause, if we can send aid to both, soldiers or money for example, we are to do so;

Lib. ix. 25. Liv. vii. 31. <sup>7</sup>Acarnanes Spartanis dicunt apud Polybium: eodemque pertinet Consulis Romani responsum Campanis datum: *amicitias ita institui par est, ne qua vetustior amicitia ac societas violetur.*

Sylv. in Verb. Bell. p. 1. n.7. Lib. vi. 10. 4 Sed addenda exceptio, nisi fedus posterius ultra promissionem aliquid habet, <sup>8</sup>quod quasi dominii translationem in se contineat, puta subjectionis aliquid. <sup>9</sup>Nam et sic in venditione dicimus priorem præferri, nisi posterior dominium transstulerit. Sic Nepesini apud Livium deditioinis, quam societatis, fides sanctior. Distinguunt hæc alii subtilius; sed quæ dixi, ut simpliciora, ita veriora arbitror.

Dec. cons. 407. Dec. cons. 265. et Cap. 451, 455, 461. Lib. i. 71. XIV. Finito tempore fedus tacite renovatum intelligi non debet, nisi ex actibus qui nullam aliam interpretationem recipiunt: non enim facile præsumitur nova obligatio.

XV. Si pars una fedus violaverit, poterit altera a federe discedere: nam capita federis singula conditionis vim habent. Exemplo sit illud apud Thucydidem: *λύουσι τὰς σπονδὰς οὐχ οἱ δι’ ἐρημίας ἄλλοις προστόντες ἀλλ’ οἱ μὴ βοη-*

<sup>7</sup> Immo ΖEtoli, adversus Acarnanes, ore Chlœnæs Legati loquentes. Inspice locum, quem distinctius in margine indicavi. J. B.

<sup>8</sup> *Ne qua vetustior amicitia ac societas violetur]* Χρή φίλοις κατ’ ἔχθρων

*συμμαχεῖν, οὐ κατὰ φίλων amicis auxilia ferenda contra hostes, non contra amicos,* dicit Ptolemaeus Atheniensibus apud Appianum in legationum excerptis. [Sed alio pertinet hic locus, ut patet statim; nimur ad casum, de quo su-

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as we are to pay several personal creditors. But if our individual presence, as having promised, be required, reason requires that he be preferred with whom the league is oldest: so the answer of the consul to the Campanians.

4 But an exception is to be added, if the later league contain, besides a promise, anything which contains a transfer of ownership, or a subjection to the other party. For thus in selling also, we say that the prior sale is valid, except the later sale transfer the ownership. So in Livy the Nepesini held their surrender more binding than their alliance. Others make more subtle distinctions, but I believe this, as most simple, to be also most true.

XIV. When the time is ended, the treaty ought not to be tacitly supposed renewed, except by acts which receive no other interpretation: for a new obligation is not lightly presumed.

XV. If one party violate the league, the other may withdraw from the agreement: for every article of the agreement has the force of a condition. Take two examples from Thucydides. [See.] But this is only true if it be not otherwise agreed, as is sometimes

θοῦντες οἷς ἀν ξυνομόσωσι· *Soluti federis culpm sustinent, non qui deserti ad alios se conferunt, sed qui quam jurati promiserant opem, re non præstant.* Alibi apud eundem: Lib. iv. 22. δ, τι δ ἀν τούτων παραβαίνωσιν ἐκάτεροι καὶ ὅτιοῦν, τότε λελύσθαι τὰς σπουδὰς· *Sed si vel tantillum ex dictis pars alterutra transgredetur, rupta fore pacta.* Sed hoc ita verum est, ni aliter convenerit: quod fieri interdum solet, ne ob quasvis offensas a federe discedere liceat.

XVI. 1 Sponzionum tot esse materiæ possunt, quot federum. Distant enim hæc personarum facientium potestate. Sed duo sunt quæ de sponzionibus quæri solent: <sup>a</sup>Primum si improbetur a rege aut civitate sponsio, in quid teneantur sponsores, ad id quod interest, an ad restituendam rem in eum statum, in quo erat ante sponzionem, an ad corpus dedendum. Prima sententia videtur juri civili Romano congruere: secunda æquitati, quam in Caudina controversia tribuni plebis L. Livius et Q. Mælius urgebant: tertia usu probata est, ut exemplis sponzionum duarum nobilium Caudinæ

pra, § 13. n. 1. in fine. Ceterum verba ipsa non reperio in Excerptis indicatis; et memoria heic videtur omnino fefellerisse Auctorem. J. B.]

<sup>a</sup> Quod quasi dominii translationem in se contineat] Vide Radevicum II. 7.

<sup>a</sup> Nam et sic in renditione] Edicto Theodorici, c. 138.

<sup>b</sup> Confer PUFENDORFUM, *De Jure Nat. et Gent.* Lib. viii. cap. ix. § 12, 13. J. B.

done; that a withdrawal from the league is not to be justified by every slight offense taken.

XVI. 1 Sponsions, that is, conventions made on personal responsibility (see c. III.) may be as various in their subject-matter as public treaties. They differ in the power of those who make them. But there are two common questions concerning such conventions: First, if the convention be rejected by the king or the state, to what are the responsible parties bound? To give an equivalent; or to restore things into the state in which they were before the convention; or to give up their persons? The first course appears to be conformable to the Roman Civil Law; the second, to equity, as was urged by the Tribunes in the Caudine controversy; the third, to usage, as the conspicuous examples of the Caudine and the Numantian conventions shew\*.

But the important point is, that the supremo authority is not bound to any one course. As Posthumius says: *You (the people) have made no convention with the enemy; you have not authorized any*

\* Flor. I. 16, and II. 18. Gronov.

Liv. ix. 2.

Ibid.

et Numantines apparuit. Sed illud ante omnia tenendum, eum qui summum imperium habet nullam in partem obligari. Bene enim Romanis Posthumius: *Hosti nihil spondistis: civem neminem pro vobis spondere jussistis; nil ergo vobis nec nobiscum est, quibus nihil mandastis, nec cum Samnitibus, cum quibus nihil egistis.* Bene idem: *Injussu populi nego quicquam sanciri posse, quod populum teneat:* et hoc non minus recte: *si quid est, in quod obligari populus possit, in omnia potest.*

2 Ergo nec ad id quod interest, nec ad restitutionem populus tenebatur: cum quo si negotium sibi esse voluissent Samnites, retinere exercitum apud Furculas Caudinas debuerant, et Romam legatos mittere, qui cum Senatu ac populo de pace ac federe agerent, ut quanti ipsis esset exercitus incolumentis id ipsi aestimarent. <sup>9</sup>Tum demum si pactis statum non esset, potuissent dicere, quod et ab ipsis et a Numantinis

<sup>9</sup> Imprudenter quidem egerunt Samnites: sed non minus propterea violatae fidei publicae rei fuerunt Romani. Ostendit id Celeberrimus JCTUS HALLENSIS, CHRISTIANUS THOMASIUS, Dissertatione singulari *De Sponsione Romanorum Caudina*, quae sexta est inter Lipsienses. Plura diximus in Notis nostris Gallicis.

J. B.

<sup>b</sup> *Milites omnes fuisse obligator*] Sic

Numantini, si sponsio non probaretur, exercitum sibi dedendum censebant, ea sponsione liberatum. [Hoc habere videtur ex Orosio, *Hist. v. 5.* Ceterum idem modo laudatus Clar. Thomasius de hac quoque *Sponsione Romanorum Numantina Dissertationem scripsit, numero xiv. in eodem volumine. J. B.*]

<sup>c</sup> *Fide sponsorum*] Ii erant consules duo, questores duo, prefecti iv. tribuni

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*citizen to make a convention for you: you have nothing to do with us, to whom you gave no commission, nor with the Samnites, with whom you have had no transaction.* He adds well: *I deny that without the permission of the people, any engagement can be made which binds the people:* and, also well: *If the people can be bound to anything [by the acts of others] it may be bound to all things.*

2 Therefore the People was not bound either to compensation or to restitution. If the Samnites wished to deal with the People, they ought to have kept the army at the Caudine Forks, and to have sent ambassadors to Rome, to treat with the Senate and People concerning peace, leaving them to estimate the safety of the army at what value they might. And then they might have said, what Velleius reports that they and the Numantines said, that the violation of public faith ought not to be deemed expiated by the blood of an individual.

3 With greater speciousness it might be said, that all the soldiers were bound by the treaty. And that would have been equitable, if

dictum ait Velleius, publicæ violationem fidei non debere unius lui sanguine.

3 Majori specie dici potest <sup>b</sup> milites omnes fuisse obligatos. Et certe æquum id esset, si ipsorum jussu ac nomine contractum foret a sponsoribus, ut in pacto quod Hannibal fecit cum Macdonibus factum videmus. Quod si <sup>c</sup>fide sponsorum et <sup>d</sup>sexcentorum, quos imperarunt, obsidum fuerunt contenti Samnites, habent quod sibi imputent. Rursum si sponsores præ se tulerunt potestatem publico nomine contrahendi, ex damno per dolum dato ad restitutionem tenebantur. Si id non apparet, tenebantur ad id quod intererat ex vi negotii ratum haberi. Et hoc casu non corpora tantum sed et bona sponsorum fuissent obligata Samnitibus, nisi poenam vice ejus quod interest expressissent. Nam de obsidibus convenerat, ut capite luerent si pacto non staretur. De sponsoribus an eadem dicta sit poena in obscurō est. Poenæ autem stipulatio

xii. narrante Appiano (Excerpt. Legat. num. 3. pag. 442. *Fulg. Ursin.*) Hi omnes dediti ex Caudino sponsi: ex Numantino consul solus, ceteris partium, ob Tiberium Gracchum, ut in Gracchorum vita narrat Plutarchus, (pag. 827 A.)

<sup>d</sup> Sexcentorum, quos imperarunt, obsidum] Pontius filius apud Appianum: τῶν τε ἵππων ἐπιλέξομαι τοὺς ἀπι-

φανεστάτους, ὅμηρα τῶνδε τῶν συνθηκῶν, ἔτοι ἄπας ὁ δῆμος ἐπιψηφίζῃ· equitum potissimos deligam, qui obsides sint, donec populus pacta firmet. Satis esse obsides tenitis arbitrio relinqui censuere Lusitani in re simili. Mariana xxii. 12. Qui deditos accipiunt, poenam remittere censemur. Polybius Excerpto cxxii.

the treaty had been negotiated in their name, and under their direction, by the acting parties, as was done in the treaty of Hannibal with the Macedonians. But if the Samnites were content with the engagement of the persons negotiating, and of the 600 hostages whom they demanded, they had themselves to blame. On the other hand, if the negociators pretended that they had the power of making a convention in the name of the public, they were bound to restitution, as having done damage by fraud. If that does not appear, they were bound to a reasonable compensation to the Samnites, according to the purport of the negotiations. And in this case, not only the bodies, but also the goods of the negociators, were bound to the Samnites, except they had paid such a compensation as we have spoken of. For, with regard to the hostages, it was agreed that if the engagement did not stand, their lives were to be forfeited. Whether the same penalty was agreed upon for the negociators, does not appear. But the stipulation of a penalty affects what is done, in this way: that if the thing to be done cannot be performed, there is nothing else in the

tali modo facta efficit, ut si factum præstari nequeat, nihil aliud sit in obligatione: succedit enim certum loco incerti quod interest. Erat autem communis istorum temporum sententia, etiam vitam valide posse obligari.

4 Apud nos autem, qui aliter sentimus, existimo tali sponsione bona primum ad id quod interest, et si ea non sufficiant, corpus ad servitutem obligari. <sup>Script. de Vir. Ill. c. 43.</sup> <sup>\*Fabius olim Maximus cum pactum quoddam ejus cum hostibus factum senatus improbasset, fundum suum ducentis millibus vendidit, et fidei satisfecit. Samnites vero Brutulum Papium induciarum ruptorem simul cum bonis suis dedendum recte censuerunt.</sup>

<sup>Plut. Fab.  
Max. p. 178.  
Liv. viii. 39.</sup>

XVII. 1 Altera quæstio est, an sponsio obliget summam potestatem ex notitia et silentio. Hic distinguendum primum an pure facta sit sponsio, an sub conditione si rata haberetur a summa potestate. Nam hæc conditio non impleta (debent autem conditiones diserte impleri) nullam facit sponsionem. Quod recte convenit in sponsionem Lutatii cum Poenisi: accedebat quod ea se populus, quia suo injussu facta

<sup>Liv. xxl. 19.  
Polyb. iii. 29.</sup>

<sup>\* Fabius olim Maximus] Diodorus Siculus in excerptis Peirescianis, Vale-</sup> <sup>rius Maximus iv. c. viii. [Non Diodorus Siculus, sed Dion Coccoianus habet</sup>

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obligation [but the penalty]: for the penalty is introduced as something certain into the place of an uncertain compensation. And at that time the common opinion was, that a man's life might be seriously given as a pledge.

4 But with us who think differently, I am of opinion that by such a convention, first, the party's goods are liable for compensation of the interest affected, and if they are not sufficient, that his body is forfeited to slavery. When Fabius Maximus had made an agreement with the enemy, which the Senate repudiated, he sold his landed property for 200,000 sesterces, and made good the loss. And the Samnites rightly conceived that Brutulus Papius, who broke a truce, should be given up along with his property.

XVII. 1 Another question is, whether a convention made by a subordinate person, on his own responsibility, binds the supreme power, by knowledge and silence on their part. Here we must first distinguish whether the convention is made simply, or under condition of being ratified by the supreme power. For if so, this condition, not fulfilled, (for conditions must be expressly fulfilled,) nullifies the convention; which applies to the convention of Lutatius with the Carthaginians; to which was to be added, that the people, because that convention was made without its authority, denied that it was bound thereby: and therefore another treaty was made on a fresh footing

erat, teneri negaverat: itaque publico consilio aliud de integro fedus factum erat.

2 Videndum deinde, an præter silentium res aliqua accesserit: nam sine re aut facto aliquo silentium non satis probabilem voluntatis conjecturam suppeditat, ut ex his, quæ de dominii derelictione supra diximus, intelligi potest. Sed si actus aliqui accesserint, qui ad aliam causam probabiliter referri nequeant, tum recte intelligitur actus ratus esse habitus: modo probatum id quod cum Gaditanis convenerat, notat Cicero pro Balbo.

3 Silentium adversus Carthaginenses urgebant Romani, de pactione cum Asdrubale facta. Sed cum illa pactio verbis <sup>Polyb. et Liv.  
dict. loc.</sup> concepta esset negantibus, ne Pœni amnem Iberum transirent, vix erat ut silentium solum ad inducendam ratihabitionem facti alieni valeret, quippe cum factum proprium nullum secutum esset, nisi aliquando Pœnus Iberum transire volens prohibitus a Romanis esset, eorumque dicto Pœni paruisserent: talis enim actus vim habet actus positivi, nec manet intra

id, de quo Auctor noster loquitur. [Brutulum Papium] Dion excerpto  
Vide pag. 597. Excerptorum illorum, legationum iv.  
ab H. Valesio editorum. J. B.]

by the public authority.

2 We must next see whether, besides silence, any other circumstance has been added. For silence, without some thing or act, does not supply a sufficiently probable conjecture of the will; as may be understood by what we have said above, of the dereliction of ownership. But if any act have been added which cannot be probably referred to another cause, then the act of convention is rightly understood to be accepted as valid. And so the convention with the Gadi-tani was proved valid, as Cicero notes.

3 The Romans urged silence against the Carthaginians in reference to the convention made with Asdrubal. But since that convention was conceived in negative expressions—that the Carthaginians should not pass the Ebro—it was scarcely a case in which silence alone could establish a ratification of the act of another: since no act of theirs had followed, except it might be that some Carthaginians, wishing to pass the Ebro, had been prevented by the Romans, and the Carthaginians had acquiesced: for such an act has the force of a positive act, and is not merely negative. But if the pact of Lutatius had had more parts, and it appeared that the other parts, though dissenting from common rule, had been observed by the Romans, then there would be a sufficient proof of the confirmation of the convention.

fines nude abnutivos. Quod si Lutatii pactio plures habuisset partes, et ceteras partes a jure communi abeuntes observatas a Romanis semper appareret, jam satis firma esset conjectura probatae pactionis.

4 Restabat hic dicere aliquid de pactionibus, quas duces et milites non de eo quod summi est imperii, sed de re privata sua aut sibi permissa faciunt: sed de his agendi opportunior erit locus ubi ad ea quae in bello accidunt perventum erit.

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4 It remained to treat of the conventions which generals and commanders of armies make, not concerning political matters, but their own proceedings and business: but we shall have a better opportunity of discussing this in treating of the rules of War.

## CAPUT XVI.

### DE INTERPRETATIONE.

- I. *Quomodo promissa obligent exterius.*
- II. *Verba, si alio conjecturæ absint, intelligenda ex proprietate populari.*
- III. *Verba artis ex arte.*
- IV. *Conjecturæ usum esse ex ambiguitate vocum, ex specie repugnantiae, aut quia sponte se ingerunt:*
- V. *Ut ex materia:*
- VI. *Ex effectu:*
- VII. *Ex conjunctis: origine, aut etiam loco:*
- VIII. *Quo pertinet conjectura ex ratione movente, quæ quando et quomodo locum habeat.*
- IX. *Distinctio significationum in laxas et strictas.*
- X. *Distinctio promissorum in favorabilia, odiosa, mixta, aut media.*
- XI. *Rejecta circa actus populorum aut regum differentia contractuum bonæfidei, aut stricti juris.*
- XII. *Ex dictis distinctionibus significationum et promissorum regulæ formantur circa interpretationes.*
- XIII. *An sociorum nomine futuri veniant, et quatenus: ubi de federe Romanorum cum Asdrubale, et similibus controversiis.*
- XIV. *Quomodo interpretandum, Ne alter populus alterius injussu bellum gerat.*
- XV. *De illius verbis, Liberam fore Carthaginem.*
- XVI. *Quæ pacta personalia habenda, quæ realia, distinctio-*
- tionibus explicatur.*
- XVII. *Fedus cum Rege initum extendi ad Regem regno pulsum:*
- XVIII. *Non ad regni invasorem.*
- XIX. *Promissum ei qui primus hoc fecerit, si plures simul fecerint, cui debeatur.*
- XX. *Conjectura se ultro offerens: aut extendit, et quando id fiat:*
- XXI. *Ubi et de mandato per aliud implendo:*
- XXII. *Aut restringit: idque vel ex defectu originario voluntatis, qui colligitur ex absurdio:*
- XXIII. *Ex cessatione rationis unicæ:*
- XXIV. *Ex materiæ defectu:*
- XXV. *(Observatio circa conjecturas proxime dictas:)*
- XXVI. *Vel ex casus emergentis repugnancia cum voluntate: qui sumitur ex illico:*
- XXVII. *Ex onere nimium gravi, habita ratione actus:*
- XXVIII. *Ex signis aliis, ut ubi partes scripti inter se committuntur:*
- XXIX. *Quæ tum regulæ observandæ sint.*
- XXX. *Scripturam in dubio ad contractus validitatem non requiri.*
- XXXI. *Regum contractus interpretationem ex jure Romano non sumere.*
- XXXII. *Verba conditionem acceptantis, an offerentis, magis spectanda, per distinctiōnem explicatur.*

I. 1 IPSUM qui promisit solum si spectamus, sponte id præstare obligatur in quod obligari voluit. *In fide*

*De Offic. I. 12. quid senseris non quid dixeris cogitandum,* inquit Cicero.

Sed quia interni actus per se spectabiles non sunt, et certi aliquid statuendum est, ne nulla sit obligatio, si quisque sensum quem vellet sibi affingendo liberare se posset; ipsa dictante naturali ratione jus est ei, cui quid promissum est, promissorem cogere ad id quod recta interpretatio suggest: nam alioqui res exitum non reperiret: quod in moralibus pro impossibili habetur. Hoc forte sensu cum de pactis egisset Isocrates præscriptione adversus Callimachum, τούτῳ, inquit, νόμῳ κοινῷ πάντες ἀνθρωποι διατελοῦμεν χρώμενοι, ut recte eum locum emendavit vir eminentissimæ eruditionis Petrus Faber, <sup>1</sup>hac lege communi homines inter nos perpetuo utimur, nec Græci tantum, sed et Barbari, ut paulo ante idem dixerat.

2 Huc illud pertinet in antiqua federum formula apud Livium: *Sine dolo malo <sup>2</sup>utique ea hic hodie rectissime in-*

<sup>1</sup> In toto isto Capite perpetuo conferendus PUFENDORF. *De Jure Nat. et Gent.* Lib. v. cap. 12. cum Notis nostris. J. B.

<sup>2</sup> Utique ea hic hodie rectissime intellecta sunt] Vota interpretanda, ut communiter sumuntur, notant Hebrei ad Num. xxx.

<sup>3</sup> In Operc Semestrium, Lib. i. cap. 7. in fine. J. B.

<sup>b</sup> Non grammatica qua est ex origine] Bene Procopius Vandalicorum L. ubi de voce agit Federatorum: τοῦ χρόνου τὰς προσηγορίας, ἐφ' ὃν τέθυνται, ἡκιντα αἴξοντος τηρεῖν. ἀλλὰ τὸν πραγμάτων δὲ τεριφερομένων γά τοιτά δύσιν θέλουσιν διθρωποι, τῶν πρόσθεν ὠνομασμένων διγυαροῦντες. Longa dies non solet servare voces in quibus primum date sunt sensu: vertun-

## CHAPTER XVI. Of Interpretation.

I. 1 If we merely consider him who has promised, he is bound to perform, without compulsion, that to which he was willing to be bound. *In good faith, what you thought, not what you said, is to be considered,* says Cicero. But because internal acts of themselves are not an object of sense, and some certain rule must be established, in order that obligations may not be frustrated, as they might be, if any one, by pretending any sense of his words which he chose to assign, could free himself; natural reason dictates that what is promised to any one, compels the promiser to that which a right interpretation suggests; for otherwise the matter would have no determinate result; which in moral matters is held to be impossible. Perhaps it was in this sense that Isocrates, treating of pacts, spoke of the common rule which all observe. So Livy: *sine dolo malo intellecta.*

2 The measure of right interpretation, is the purpose, as inferred

*tellecta sunt.* Rectæ interpretationis mensura est collectio mentis ex signis maxime probabilibus. <sup>2</sup>Ea signa sunt duum generum, verba et conjecturæ aliae: quæ aut seorsim considerantur, aut conjunctim.

II. Si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, <sup>b</sup>non grammatica quæ est ex origine, sed populari ex usu,

Quem penes arbitrium est, et jus et norma loquendi.

Horat. Art.  
Poet. v. 73.

Stulto ergo perfidiæ effugio usi sunt <sup>c</sup>Locri, cum polliciti se pactis staturos quamdiu terram hanc insisterent et capita humeris gestarent, terram calceamentis injectam, et alliorum capita humeris imposita abjecerunt, quasi eo modo religione se possent exsolvere, quæ historia apud Polybium exstat: ac similis perfidiæ exempla aliquot apud Polyænum, quæ transcribere nihil opus est, quia controversiam non habent. Ejusmodi fraudibus recte dixit Cicero adstringi, non dissolvi per- <sup>d</sup>De opa. iii. <sub>se</sub> jurium.

III. <sup>d</sup>In artium autem vocabulis, quæ populus vix capit,

*tur enim res ipsæ qua volunt homines, vocabula illa primitus imposita rebus nihil curantes.* (Cap. 11.)

<sup>c</sup> Locri] Polybius, Lib. XII. c. 4. Simile quod Boooti urbem polliciti reddere, non stantem sed eversam reddidere. Thucyd. v. (cap. 42) et quod Mahumetes Sultanus, Eubœa capta, eum dissecuit cui caput incolume fore promiserat. [Vide J. CUSPINIAN. de

Turcarum orig. in Mahumete II. pag. 132. Edit. Lugd. B. 1654. J. B.]

<sup>d</sup> In artium autem vocabulis] Augustinus in rhetoricis: *Ut multa nova tam a technicis et mathematicis quam a philosophis cognominantur, accipere debemus non tam pro solito usu consuetudinis, quam pro conditione precepti.* (Cap. 9. Princip. Rhetoric. falso illi Doctori tributorum.)

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from the most probable signs. These signs are of two kinds, words, and other conjectures; which are considered either separately or conjointly.

II. If there is no conjecture which points another away, the words are to be understood, not according to grammatical and etymological, but popular propriety, as regulated by usage. That was a foolish evasion therefore of the Locrians, who, when they had sworn that they would keep their compact as long as they stood upon the earth and carried heads on their shoulders, put earth in their shoes, and heads of garlic on their shoulders, and then threw them away; as if they could in that way free themselves from their oath: as the story is in Polybius. There are some examples of similar bad faith in Polyænum, which it is not necessary to transcribe, because there is no controversy in such cases. Cicero rightly says, that such artifices do not extenuate, but establish perfidy.

III. In terms of art, however, which are popularly hardly intel-

Cap. vii.

Parad. vi.

L. 2. D. de  
his qui not.  
in fam.Lib. III. I. De  
Re MILIT.

adhibenda erit artis cujusque prudentum definitio, ut quid sit majestas, quid parricidium, quæ ad finitivum statum referunt oratoriæ artis magistri. Vere enim dictum a Cicerone Academicarum primo: *Dialecticorum verba nulla sunt publica, suis utuntur: et id quidem commune omnium fere est artium.* Sic si in pactis de exercitu dictum fuerit, definiemus exercitum esse eam militum multitudinem, quæ palam fines hosticos ausit invadere: nam passim opponunt historici id quod furtim fit aut latrocinantium more, et quod justo fit exercitu. Quare pro viribus hostium aestimandum, quæ copiæ exercitum faciant. Cicero exercitum vocat sex legiones et auxilia. Polybius Romanum exercitum plerumque ait constitisse sexdecim millibus<sup>3</sup> Romanorum, viginti sociorum: at minor quoque numerus implere potest ejus nominis mensuram. Nam Ulpianus exercitui præses eum ait, qui vel uni legioni cum auxiliis præest; id est, ut Vegetius exponit, decem millibus peditum, duobus millibus equitum. Et Livius in octo millibus<sup>4</sup> speciem ponit justi exercitus. Pari modo de classe erit aestimandum. Sic "arx est locus, qui arcere hostilem exercitum ad tempus possit.

<sup>3</sup> Nimirum peditum. Sed accedebat præterea etiam Equitatus, ut ex sequentibus pater, *Hist.* Lib. III. cap. 72. Vide et Is. Casauboni Notam in Lib. I. cap. 16. pag. 21. Ed. Amst. J. B.

<sup>4</sup> Prima Editio sola habet heic in margine, Lib. xxv. Locus est cap. 6. Speciem justi exercitus fecissemus. Sed reliquæ clavis Cannensis, de quibus heic agitur, et quæ Venusiam redierant,

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ligible, the definition of the meaning by persons learned in the Art is to be taken: as, what is Treason, what is Parricide; in which writers on Oratory refer to definitions. As Cicero says, *The words of the Dialecticians are not those of common language, but of their own art, and the same is the case in every art.* Thus if in facts mention be made of an army, we shall define an Army to be a body of soldiers which openly invades an enemy's territory; for historians perpetually put in opposition what is done stealthily in the manner of robbers, and that which is done with a regular army. And therefore what numbers make an army, must be judged according to the force of the enemy. Cicero calls six legions with auxiliaries an army. Polybius says, the Roman army consisted commonly of 16,000 Romans and 20,000 allies: but a smaller number may satisfy the name. For Ulpian says, that he commands an army who commands a single legion with the auxiliaries; that is, as Vegetius explains, 10,000 foot and 2000 horse. And Livy makes the force of a regular army 8000 men. In the same way we must judge of a Fleet. So a Fort is a place strong enough to be held against the enemy for a time.

IV. 1 Conjecturis assumtis opus est, ubi verba aut verborum complexio sunt πολύσημα, id est, *plures significations recipiunt*. Hunc locum Rethores vocant ἐξ ἀμφιβολίας. Dialectici subtilius, si in una voce sensus esse plures possent, ὄμωνυμιαν, si in complexione, ἀμφιβολίαν. Similiter conjecturis opus est, quoties in pactis est ἐναντιοφανεία, *species quædam repugnantiae*. Tunc enim conjecturæ quærendæ sunt, quæ partes alias aliis concilient, si fieri potest: nam si certa sit pugna, quod posterius inter contrahentes placuit, proribus derogabit: quia uno tempore nemo contraria potuit voluisse; et ea natura est actuum qui a voluntate pendent, ut novo actu voluntatis discedi inde possit, sive μονομερῶς ex parte una, ut in lege et testamento, sive conjunctim, ut in contractibus et pactis. Hunc locum Rethores vocant ἐξ ἀντινομίας. Et his quidem casibus verborum evidens obscuritas cogit recurrere ad conjecturas.

2 Interdum vero ipsæ conjecturæ ita evidentes sunt, ut sponte se ingerant, etiam contra receptionem verborum significatum. Hunc locum Graeci Rethores vocant περὶ ρῆτον

erant tantum quatuor millia hominum,  
ut narravit supra *Historicus*, Lib. xxi.  
cap. 54. init. J. B.

\* *Arx est locus, qui arcere hostilem*

*exercitum ad tempus possit*] Servius ad  
1 *Æneidos*: *Arces dictæ ab eo quod est  
arco, quod inde hostes arcuntur, hoc est  
prohibentur.* (Ad vers. 20.)

IV. 1 It is necessary to have recourse to conjectures, when the words or the connexion of the words is ambiguous, admitting of numerous significations, which the Rhetoricians call an *Amphiboly*\*. The Dialecticians, more subtly, distinguish *Homonymy*, in which these several senses are in one word, from *Amphiboly*, in which they are in a connexion of words. The like conjectures are necessary when there is in pacts an *Enantiofany*, an appearance of contradiction. For the conjectures are to be sought which may reconcile one part with another, if it may be done. For if the contradiction be real, the latter agreement of the contracting parties must supersede the former: because nobody can will two opposite things at the same time: and the nature of acts which depends on the will is, that by a new act of the will they may be changed, either in one part only, as in a law, and a testament, or in several parts at the same time, as in contracts and pacts. Here they speak of *Antinomies*\*. In these cases, then, the evident obscurity of the word compels us to recur to conjectures.

2 Sometimes the conjectures are so evident, that they spontaneously suggest themselves, even contrary to the more received

\* Ad Herenn. i. 11, and 12; Quintil. viii. 7 and 9.

*kai diavoias*. Latini *ex scripto et sententia scripti*. Loci autem, ex quibus voluntatis conjecturæ promuntur, præcipui sunt ex materia, ex effectu, ex conjunctis.

Everh. in  
loc. a sub.  
mater.

L. 15. § 4.  
D. loc. cond.

V. <sup>1</sup>Ex materia, ut vox diei, si triginta dierum pactæ sint inducæ, non debet de diebus naturalibus, sed civilibus intelligi: id enim materiæ congruit. Ita verbum donare sumitur pro transigere ex negotii qualitate. Sic armorum vox, quæ modo belli instrumenta, modo milites armatos significat, pro materia aut hunc aut illum in modum erit interpretanda. Ita homines qui reddere promisit, vivos non mortuos reddere debet, contra quam cavillati sunt Platæenses. Et ferrum depone-re jussi, satisfecerunt si gladium deponant, non et fibulas, <sup>2</sup>quod Pericles argutabatur: et exitus ex urbe liber intelligi debet, ita ut et iter tutum sit, contra quam fecit Alexander. Et pars dimidia navium in divisione, integrarum intelligi debet, non sectarum, contra quam <sup>3</sup>Romani Antiocho fecerunt. De similibus idem esto judicium.

Everh. in  
loc. ab  
aberr.

VI. Ex effectu, in quo præcipuum est si vox ex usu re-

<sup>1</sup> [Ex materia] Tertullianus *de Pudicitia*: *ex materia dicti dirigendum est sermo*. Idem habet libro *de Resurrectione Carnis*. [In hoc opere leguntur verba ab Auctore adlata, nisi quod pro voce *sensus* male scriperit *Sermo* cap. 37. In libro autem *de Pudicitia*, cap. 8.

*et seqq.* ex hac regula nonnulla loca Scripturæ interpretari conatur Tertullianus; verba autem ipsæ regule non reperio. *J. B.*]

<sup>2</sup> Refert id FRONTINUS, *Strategem.* Lib. iv. cap. 7. num. 17. *J. B.*

<sup>3</sup> Narrat illud VALERIUS MAXIM.

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signification of words. This is the received distinction of What is said, and what is meant. The topics, from which conjectures of the meaning are collected, are principally, the Matter, the Effect, and the conjoined Circumstances.

V. From the Matter; as if a truce of 30 days is made, the word *Day* is to be understood, not of natural days but of civil days; for that agrees with the matter: so the word *donare*, for giving up one's rights: so the word *arms*, which sometimes means the instruments of war, sometimes armed soldiers, must, according to the matter, be interpreted one way or the other: so he who promises to give up men, must give them up alive, not dead, as the Platæans quibbled. So when persons are to lay down their steel, this is to be satisfied by laying down their swords, not their steel buckles, as Pericles ingeniously suggested; and when men are to be allowed to depart from a city, they are to do so freely and in safety, contrary to Alexander's proceeding: so the half of the ships, is half the number of whole ships, not each ship cut in halves: as the Romans did to Antiochus. And the like cases must be judged in the same manner.

ceptiore sumta effectum post se traheret a ratione alienum. In ambigua enim voce ea potius accipienda est interpretatio, quæ vitio caret. Itaque non admittenda <sup>L. In Ambig.</sup> Brasidæ cavillatio, <sup>D. de Leg.</sup> Thuc. iv. 28. qui pollicitus agro Bœoto se decessurum, negabat agrum Bœotum esse quem exercitu insideret, quasi de bellica possessione non de finibus antiquis ea vox intelligenda esset: quo sensu inanis fuerat pactio.

VII. <sup>Everb. in loc. a conf. Duar. Leg.</sup> Coniuncta sunt aut origine, aut etiam loco. Coniuncta origine sunt, quæ ex eadem voluntate proficiscuntur, etiamsi alio loco et occasione dicta, unde conjectura nascitur, quia in dubio voluntas creditur sibi fuisse consentiens. Sic apud Homerum quod dictum erat inter Paridem et Menelaum ut victori Helena cederet, ex posterioribus ita erit exponentium, ut victor is demum intelligatur qui alterum occiderit. Rationem reddit Plutarchus: *οι δικασταὶ τῷ μηδὲν ἀμφισβητήσιμον ἔχοντι προστίθενται, τὸ ἀσφέστερον ἔάσαντες judices accedunt ei quod minus ambiguum est, omissio eo quod est obscurius.*

Lib. VII. cap. 3. § 4. Verum aliter LIVIUS, XXXVIII. 39. J. B.

<sup>7</sup> Non Brasidæ, Ducus Lacedæmoniorum, sed Praeonis ab Atheniensibus missi. Inspice locum Thucydidis, in ora libri distinctius designatum. J. B.

<sup>8</sup> Coniuncta sunt aut origine, aut

etiam loco] Bene Augustinus contra Adimantum, c. 14. *Particulas quasdam de scripturis eligunt quibus decipient imperitos, non connectentes quæ supra et infra scripta sunt, ex quibus voluntas et intentio scriptoris possit intelligi.* (§ 2. cap. xiv. Edit. Benedictin.)

VI. From the Effect; in which the main case is, when a word taken from ordinary use draws with it an absurd effect. For if the word be ambiguous, the interpretation is rather to be taken which involves no absurdity. Hence the quibble of Brasidas was not to be admitted, who, having promised that he would depart from the Bœotian territory, denied that that was Bœotian territory which he occupied with his army; as if the term were to be understood of warlike possessions, not of the ancient boundaries; in which sense the compact was unmeaning.

VII. Things are conjoined in their origin, or in place. Those are conjoined in their origin which proceed from the same will, although uttered at a different place and time; whence a conjecture is drawn, because in doubtful cases the will is supposed to be in agreement with itself. Thus in Homer, the agreement between Paris and Menelaus, that Helena should be given to the victor, must, from what follows, be so expounded, that he is victor who kills the other. Plutarch gives the reason, that judges take the view which is least ambiguous.

VIII. Inter ea quæ et loco conjuncta sunt, vim præcipuam habet <sup>b</sup>ratio legis, quam cum mente multi confundunt, cum unum sit ex indicis quibus mentem venamur. Est tamen inter conjecturas hæc validissima, si certo constet aliqua ratione tanquam causa unica voluntatem fuisse motam; nam sæpe rationes sunt plures: interdum et præter rationem voluntas semet ex vi libertatis suæ determinat, quod ad obligationem producendam sufficit. Hoc modo <sup>a</sup>donatio ob nuptias facta vim non habebit, si nuptiæ secutæ non sint.

IX. Cæterum sciendum est, voces multas habere significaciones plures, alteram strictiorem, alteram laxiorem: quod multis ex causis evenit, aut quia specierum uni nomen generis adhæret, ut in vocibus cognationis et adoptionis, item in nominibus masculinis, quæ etiam pro communibus sumi solent ubi desunt communia; aut quia usus artis latius patet quam usus popularis, ut <sup>i</sup>mors in jure civili ad deportationem producitur, cum apud populum aliud significet.

<sup>b</sup> Ratio legis] Cicero pro A. Cæcina: *Non alia est ratio juris in hoc genere duntaxat, utrum me tuus procurator dejecterit, is qui legitime procurator dicitur omnium rerum ejus qui in Italia non sit, absive reipublicæ causa, quasi quidam pene dominus, hoc est, alieni juris vicarius: an tuus colonus, aut vicinus, aut*

*cliens, aut libertus, aut quivis, qui illam vim dejectionemve tuo rogatu, aut tuo nomine fecerit.* (Cap. 20.)

<sup>a</sup> Exemplum istud non suo loco positum, quum pertineat ad superiora, *Si certo constet aliqua ratione tanquam causa unica, &c.* Deinde ibi nihil obscurum, nihil ambiguum: et exceptio

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VIII. Of things conjoined in time, that which has the greatest force, is the reason of the law, which many confound with the intention, though in fact it is one of the indications by which we trace the intention. But among conjectures, this is the strongest, if it appear certainly that the will was moved by any reason as a sole cause; for there are often several reasons; and sometimes the will determines itself by its liberty and without regard to reason, which suffices for producing an obligation. Thus a donation made in contemplation of a marriage has no power if the marriage does not follow.

IX. But it is to be remarked, that many words have several significations, one, stricter, one, laxer; which happens for many causes: either because the name of the genus is appropriated to one species, as in the word *cognition*, which, meaning any relationship, is used for one kind; and *adoption*, which meaning any assumption of a child, is used for one with certain formalities: and so in masculine words which are used as common to both genders, when common words are wanting; or because the usage of art is more wide than

X. Simul notandum est, eorum quæ promittuntur alia esse <sup>Alc. v. Rep.</sup>  
<sup>17.</sup> favorabilia, alia odiosa, alia mixta, aut media. Favorabiliæ sunt quæ æqualitatem in se habent, et quæ communem spectant utilitatem, quæ quo major est atque latius patet, eo major est promissi favor, ut eorum quæ ad pacem faciunt major quam ad bellum, et belli ob tuitionem suscepti major quam aliis de causis. Odiosa sunt quæ partem alteram tantum, aut plus altera onerant, et quæ pœnam in se continent, et quæ actus faciunt irritos, et quæ de prioribus aliquid immutant. Quod si mixtum sit aliquid, ut mutans quidem priora, sed pacis causa, id pro magnitudine boni aut mutationis modo favorable, modo odiosum censebitur, ita tamen ut, ceteris paribus, favor censeatur potior.

XI. Discrimen actuum bonæ fidei et stricti juris, <sup>1</sup>qua-  
<sup>cl. in l. non  
pos. D. de  
Leg.</sup> tenus ex jure est Romano, ad jus gentium non pertinet. Po-  
test tamen aliquo sensu hoc aptari, ut scilicet si quibus in re-  
gionibus actus aliqui formam quandam habeant communem, ea

manifesto sequitur ex natura ipsius rei.  
*J. B.*

<sup>1</sup> *Mors in jure civili ad deportationem producitur]* Vide Guicciardinum, libro xvi. ubi de pactis Caroli V. ad Mediolanensem ducatum pertinentibus sermo. (Pag. 341. *Ed. Genevens.* 1645.)

<sup>9</sup> Distinctionem illam nec satis certo fundamento niti, et parum utilem esse, ostendimus, post alios, in Notis nostris ad PUFENDORF. *De Jure Nat. et Gent.* § 12. et seqq. Capitis huic respondentis, et antea indicati. *J. B.*

<sup>1</sup> Vide eundem PUFENDORFIUM, Lib. v. cap. 2. § 8. *J. B.*

popular usage; as death, in Civil Law, includes civil death, transportation for life, though it does not mean this in popular language.

X. It is also to be observed, that of the things which are promised, some are promises of favour, others of *odium*, others mixed, others medium. Those are of favour, which are equal to both parties, and regard the common utility. In proportion as this is greater and more extensive, the greater is the favour included in the promise; as greater, thus, in things which make for peace than for war; and greater for defensive than for other war. Those are promises of *odium* which lay a burthen on one party only, or on one more than another, and which impose penalties, and nullify acts, and change former agreements. If any thing be mixed, as for instance, what changes former agreements, but for the sake of peace, that must be held favourable or odious as the one or the other may predominate, leaning to favourable, *ceteris paribus*.

XI. The distinction of acts *bonæ fidei* and *stricti juris*, so far as it flows from the Roman Law, does not pertain to the *Jus Gentium*. Yet in a certain sense it may be adapted here: so far as this for

quatenus immutata non est, actui inesse intelligatur: in aliis autem actibus, qui per se sunt indefiniti, qualis est donatio, et liberalis promissio, magis stetur dictis.

XII. 1 His positis hæc tenendæ sunt regulæ. In non odiosis sumenda verba secundum proprietatem usus popularis, et si plures sint, eam quæ latissima est; quale est ut masculinum sumatur pro genere communi, et indefinita locutio pro universalis. Sic verba hæc, *Unde quis dejectus est*, etiam ad eum restituendum pertinebunt qui vi vetitus est ad suum accedere; nam vox laxius sumta fert eam significationem, ut recte Cicero pro A. Cæcina disputat.

Bart. in l. 8*t*  
de qui pro  
Emd. D. de  
Ursc.  
Covar. III.  
Var. c. 5. n.  
8. Tiraq. in  
leg. connub.  
Gl. 8. n. 115.

2 In favorabilioribus, si is qui loquitur jus intelligat, aut peritorum juris consilio utatur, verba laxius sumenda, ut etiam includant significationem artis, aut quam lex dedit. <sup>k</sup> Ad significations autem plane impropias non recurrendum, nisi alioqui absurdum aliquid, aut pacti inutilitas sequeretur. Ex contrario verba etiam strictius quam fert proprietas sumenda erunt, si id necessarium erit ad vitandam iniquitatem vel absurditatem: at si non talis est necessitas, sed manifesta sequitas vel utilitas in restrictione, subsistendum erit intra

<sup>k</sup> *Ad significaciones autem plane impropias non recurrendum, nisi alioqui absurdum aliquid, aut pacti inutilitas sequeretur]* Vide exemplum in l. cum

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instance, that if in any place certain acts have a certain common form, that, so far as it is not changed, is understood to be inherent in the act: in other acts, more indefinite in kind, such as donative, and promise made of mere liberality, we must stand more by the words.

XII. 1 This being understood, the following rules are to be observed: In *non-odious* promises, the words are to be taken according to the general propriety of popular usage, and if such usage is manifold, according to that which is widest; as that the masculine gender goes for the common gender, and an indefinite for an universal locution. So the words [in the form of the Interdict for recovering possession] *Unde quis dejectus est*, will apply to restore him who was not ejected, but forbidden to return to his property, as Cicero rightly argued.

2 In *favourable* promises, if he who speaks understands the law, or if he have had the advice of persons skilled in the law, the words are to be taken more laxly, so that they may include a technical or a legal signification. But we must not recur to significations plainly improper, except otherwise some absurdity or the inutility of the pact would follow. On the other hand, words are to be taken more strictly

arctissimos terminos proprietatis, nisi circumstantiae aliud suadeant.

3 In odiosis vero etiam sermo figuratus aliquantulum admittitur, quo onus vitetur. Itaque in donatione et juris sui remissione verba, quantumvis generalia, restringi solent ad ea, de quibus verisimiliter est cogitatum. Et in hoc rerum genere occupatum nonnunquam id demum intelligetur, quod spes sit posse retineri. Sic auxilia promissa ab una tantum parte Barb. iv.  
cons. 92. intelligentur deberi impendiis ejus qui postulabit.

XIII. 1 Illustris est quæstio, sociorum nomine veniant tantum qui erant federis tempore, an et futuri, ut in federe facto inter populum Romanum et Carthaginensem post bellum de Sicilia: *Utriusque populi socii ab utroque populo tuti sunt.* Hinc Romani inferebant, etiamsi fedus cum Asdrubale iustum de Ibero amne non transeundo, nihil ipsis prodesset, quod Carthaginenses id ratum non habuissent, tamen si Carthaginenses factum Annibal is oppugnantis Saguntinos, quos post fedus Romani socios adsciverant, probarent, bellum indici ipsis posse tanquam federe violato. Rationes ita Livius ex-  
Lib. xxx. 12. ponit: *Satis cautum erat Saguntinis, sociis utrorumque exceptis: nam neque additum erat iis qui tunc essent, <sup>1</sup>nec,*

virum, 16. C. de Fideicommissis. inter Lacedæmonios et Athenienses.

<sup>1</sup>Nec, ne qui postea assumerentur] Thuc. Lib. v. c. 18.

Quod additum in pace Peloponnesiaca

even than propriety requires, if that be necessary to avoid injustice or absurdity; but if the necessity be not such, but a manifest justice and utility in the restriction, we must confine ourselves within the narrowest boundaries of propriety, except circumstances counsel another course.

3 In *odious* promises, figurative language is in some small measure admitted, to avoid the odium. Therefore in a donation and grant of any right, words, however general, are usually restricted to that which was probably thought of. And in this class, that is sometimes spoken of as occupied, which there is hope of retaining. Thus auxiliaries promised on one side only, are understood to be at the expense of him who asks for them.

XIII. 1 It is a noted question, whether under the title of Allies, those are included only who were so at the time of the league being made, or those who became so afterwards; as in the league between the Romans and Carthaginians after the war about Sicily: *The allies of each People shall be unharmed by each People.* Hence the Romans inferred, that though the league struck with Asdrubal, that

*ne qui postea assumerentur: et cum assumere novos licet socios, quis æquum censeret, aut ob nulla quenquam merita in amicitiam recipi, aut receptos in fidem non defendi, tantum ne Carthaginiensium socii aut sollicitarentur ad defectionem, aut sua sponte desciscentes recipi rentur?* Quæ ferme ad verbum de Polybio sumta appetat.  
Hist. lli. 29. Quid dicemus? Quin verbum sociorum et strictam illam de iis qui erant federis tempore, et ampliorem alteram significationem quæ ad futuros quoque porrigitur, recipere possit salva ratione recti sermonis, dubitandum non est. Utra ergo præferenda sit interpretatio, ex regulis ante traditis erit videntum: secundum quas dicimus, <sup>2</sup>futuros non comprehendendi, quia agitur de federe rumpendo, quæ odiosa est materia: et de adimenda Carthaginiensibus libertate, eos qui injuriam ipsi fecisse crederentur armis cogendi; <sup>3</sup>quæ libertas est naturalis, nec temere abdicata censemur.

## 2 Ergo Romanis adsciscere in societatem Saguntinos, aut

<sup>1</sup> Comprehenduntur etiam *futuri*, ut ostendimus in Notis nostris Gallicis ad hunc locum. *J. B.*

<sup>2</sup> *Quæ libertas est naturalis, nec temere abdicata censemur*] Romani Samnitibus Sidicinos bello petere volentibus, potentibusque ut id per Romanos fieri liceret, responderunt, *nihil intercedi, quo minus Samniti populo pacis bellique*

*liberum arbitrium sit.* Livius, Lib. viii. c. 2. In Antiochi federe est: *Si qui sociorum populi Romani ultra bellum inferrent Antiocho, vim ei arcendi jus esto: cum ne quam urbem aut belli jure teneat, aut in amicitiam accipiat.* Livius xxxviii. c. 38. Polybius in excerptis legationum 35. [Sidicini nequam socii erant Romanorum, ut patet

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he should not pass the Ebro, was not available to them, because the Carthaginians had not ratified it; yet that if the Carthaginians gave their sanction to the act of Annibal who besieged the Saguntines, who had become allies of the Romans after the treaty, war might be declared against them as having violated the treaty. Livy gives the reasons, which are taken almost word for word from Polybius.

How shall we pronounce on this point? That the word *allies* may mean, in a reasonable usage, both those who were so at the time of making the treaty, and a larger signification including future allies, is indubitable. Which interpretation is to be preferred, we must consider, on the preceding principles: and according to them, we say that it does not comprehend future allies, because it treats of breaking the league, which is a matter of odium, and of taking away the liberty of the Carthaginians, to punish with arms those who had wronged them; which is a natural liberty, not likely to be supposed abdicated.

2 Was it then not lawful for the Romans to take the Saguntines

adscitos defendero non licuit? Imo vero licuit, non ex vi federis, sed ex jure naturali, quod federe non erat abdicatum: ita ut Saguntini apud utrosque eo essent loco, quasi nihil de sociis convenisset: quo casu nec Carthaginenses contra fedus erant facturi, si in Saguntinos arma moverent quæ justa arbitrarentur, nec Romani si eos defenderent. Plane sicut Pyrrhi tempore inter Carthaginenses et Romanos conve-  
nerat, ut si eorum populorum alter cum Pyrrho fedus faceret, Polyb. Hist. iii. 25. ita faceret ut jus auxilia mittendi ei, quem Pyrrhus bello impeteret, salvum maneret. Non dico justum utrinque bellum esse potuisse; sed <sup>a</sup>nego pertinuisse hoc ad federis violationem: quomodo in quæstione de auxilio Mamertinis misso a Romanis distinguit Polybius, an justum id fuerit, et an per Lub. III. 26. fedus licuerit.

3 Et hoc ipsum est, quod Corcyrenses apud Thucydidem dicunt Atheniensibus, licere ipsis sibi auxilia mittere, nec Lub. I. 35. obstarere quod Athenienses habebant cum Lacedæmoniis fedus,

ex fine cap. I. præcedentis apud Livium.  
In federe autem cum Antiocho agitur tantum de jure defensionis, quod in omni pacto tacite exceptum censerit debet. *J. B.*

<sup>a</sup>Nego pertinuisse hoc ad federis violationem] Procopius Persicorum II.  
ἀφασκέ τε ὡς αὐτὸς οὐ λύει τὰς Περ-

σῶν τε καὶ Ἀρματῶν σπουδᾶς, ἐπει  
αὐτὸν εἰς ταύτας οὐδέτεροι ἔτεροι  
ψυχτό· dicebat Alamundarus rex Sarac-  
enorum, non violari a se quæ inter  
Persas Romanosque convenerant, quan-  
doquidem ipse a neutra parte conventis  
inscriptus esset. (Cap. 1.)

into alliance, or when allied, to defend them? Certainly this was lawful, not in virtue of the league, but in virtue of Natural Law, which they had not abdicated by the treaty: so that the Saguntines should be in the same situation as if no convention had been made about allies: in which case the Carthaginians would not be acting against the league, if they made what they conceived to be a just war against the Saguntines; nor the Romans, if they defended them: just as at the time of Pyrrhus, an agreement was made between the Carthaginians and Romans, that if either of those Peoples made a league with Pyrrhus, it should be lawful for the other to do so likewise. I do not say the war could have been just on both sides; but I deny that this point had to do with the violation of the league: as in the question concerning the Mamertines, Polybius distinguishes the points, whether it was just, and whether it was consistent with the league.

3 And this is exactly what the Corcyreans in Thucydides say to the Athenians, that it is lawful for them to send aid to them, and that it is not an objection, that the Athenians had a league with the Lacedæmonians, since by that league it was lawful to acquire new allies.

Lib. I. 45.

Lib. III. 7.

p. 33 A.

quando per id fedus novos socios adsciscere liceret. Atque eam sententiam secuti sunt Athenienses postea, imperato suis, ne in Corinthios pugnarent, nisi ubi ii descendere pararent hostiliter in Corcyram, aut in aliquod solum ditionis Corcyrensum, ne scilicet fedus rumperent. Non pugnat autem cum federe, ut quos alii offenderent, hi defendenterentur ab aliis, <sup>o</sup>manente de cætero pace. Justinus de his temporibus agens: *Inducias, quas proprio nomine condixerant, ex sociorum persona rumpabant, quippe quasi minus perjurii contraherent, si ferentes sociis auxilia potius quam si aperto prælio dimicassent.* Sic et in oratione de Haloneso, quæ inter Demosthenicas legitur, apparet pace quadam Atheniensium cum Philippo cautum, ut quæ ea pace non comprehendenterentur Græciae civitates liberæ essent: si quis vim inferret, defendere eas in pace comprehensis liceret. Et hoc quidem exemplum est in federe æquali.

XIV. In federe inæquali ponemus alterum, si convenerit ne alter federatorum injussu alterius bellum gerere possit; quod possum fuisse in federe Romanorum et Carthaginiensium

<sup>o</sup> *Manente de cætero pace]* Sic post tempora memorata Corcyrenses decrevere, Ἀθηναῖοι μὲν ξύμμαχοι εἶναι μετὰ τὰ ξυγκένεα, Πελοποννησοί δὲ φίλοι· *Velle se Atheniensibus ex pactis societatem armorum prestare, et cum*

*Peloponnesiis servare amicitias jura.*  
[THUCYD. III. 70.]

<sup>3</sup> Immo quia sui ipsius defensio est jus a natura concessum, quo nemo potest ullo pacto sese exuere. J. B.

<sup>p</sup> *Liberam fore Carthaginem]* Dio-

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And this opinion the Athenians themselves afterwards followed; for they gave command to their officers that they should not fight against the Corinthians, except they attacked Corcyra, or invaded its soil, in order not to break the league. For it is not at variance with a league, that they who are attacked by one party should be defended by the other, peace remaining as to other matters. Justin says, of these events, that *The treaty which they had made in their own name, they broke in the person of their allies, &c.* So in the Oration on Halonesus, it appears that, by the peace between the Athenians and Philip, it was provided that the cities of Greece, not comprehended in that treaty, should be free; and if any one attacked them, those comprehended in the peace might defend them. And this is an example in an equal league.

XIV. In an unequal league we shall suppose other terms: that it is agreed that neither of the allies shall make war without permission of the other: which were the terms of the league of the Romans and Carthaginians, after the second Punic war, as mentioned above:

post bellum Punicum secundum, supra memoravimus; sicut et positum fuit in federe Macedonico cum Romanis, ante Perseum regem. Cum belli gerendi nomen, et ad omne bellum pertinere possit, et ad id quod infertur, non quod repellitur, in dubio arctiorem hic significatum sumemus, ne <sup>Liv. xliii. 25.</sup> nimium coartetur libertas.

XV. Eiusdem generis est illud, quod Romani promiserant, <sup>¶</sup> liberam fore Carthaginem: quod quanquam ex natura actus de plenissima potestate intelligi non poterat, (belli enim suscipiendi jus et alia quædam pridem amiserant) aliquam tamen illis relinquebat libertatem, et minimum tantum, ut alieno imperio urbem sedibus transferre non tenerentur. Frustra ergo vocem Carthaginis urgebant Romani, dicentes civium multitudinem, <sup>¶</sup> non urbem significari: (quod quanquam improprium concedi potest, ob attributum quod civibus magis quam urbi convenit.) Nam in voce, liberam relinquī, *avτόνομον*, ut Appianus ait, manifesta erat captio. <sup>p. 48.</sup>

XVI. 1 Huc et illa frequens quæstio referenda est de pactis personalibus ac realibus. <sup>¶</sup> Et siquidem cum populo

dorus Siculus sic refert excerpto legationum 27. mansura illis νόμοις, χώρας, λεπά, τάφους, ἀλευθεριανές, *leges, regionem, sacra, sepulchra, libertatem.*

<sup>¶</sup> Ubi de Urbe aliqua sermo fit, quamquam ut multitudine Civium spec-

tetur, tamen non sine solo et sedificiis, quæ sedes sunt Populi, intelligitur. J. B.

<sup>¶</sup> Confer PUFENDORFIUM nostrum, *De Jure Nat. et Gent. Lib. viii. cap. 9. § 6. et seqq. J. B.*

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as also in the league of the Macedonians and Romans before the reign of Perseus. Since "making war" may include all kinds of war, both offensive and defensive, we must suppose this to be taken in the narrower sense, and to mean offensive war, that the liberty of the parties be not too much restricted.

XV. Of the same nature is that promise of the Romans, that Carthage should be free: which, although, from the nature of the act, it could not be understood of full sovereign power, (for they had already lost the right of making war and other rights,) yet it left some liberty to them, and at least so much, that they should not be compelled to remove the seat of their government by extraneous command. It was in vain, then, that the Romans laid stress on the word *Carthage* [shall be free,] as if it meant the population, not the city; (which, though an improper expression, might be conceded, the attribute *free* belonging to the population rather than the city). For in the word, *free*, *avτόνομον*, as Appian says, there was a mere quibble.

XVI. 1 To this is to be referred that frequent question concern-

libero actum sit, dubium non est, quin quod ei promittitur sui natura reale sit, quia subjectum est res permanens. Imo etiamsi status civitatis in regnum mutetur, manebit fedus, quia manet idem corpus, etsi mutato capite, et, ut supra diximus, imperium quod per regem exercetur non desinit imperium esse populi. Excipiendum erit, si appareat causam fuisse propriam ei statui, ut si liberæ civitates libertatis tutandæ causa fedus contrahant.

2 At si cum rege contractum sit, non statim personale erit censendum fedus: nam ut recte dictum est a Pedio et Ulpiano, plerumque persona pacto inseritur, non ut personale pactum fiat, sed ut demonstretur cum quo pactum factum est. Quod si adjectum sit federi ut perpetuum sit, aut factum in bonum regni, aut cum ipso et successoribus: sicut solere adjici in federibus, *kai τοῖς ἐκγόνοις, et posteris*, ait Libanius in defensione Demosthenis, aut ad tempus definitum, jam satis apparebit reale esse. Tale videtur fuisse <sup>4</sup>fedus Romanorum

<sup>4</sup> *Fedus Romanorum cum Philippo Macedonum rege* Livius Lib. XLII. (c. 26.)

<sup>5</sup> Quum distinctio illa sit incerta et lubrica admodum, tutius est statuere, in dubio Fœdera cum Rege inita censenda esse realia, quoniam in dubio Rex intellegitur egisse tamquam Caput Civitatis, et ejus utilitatis causa. Vide Celeberrimi THOMASII *Jurisprudentiam Divi-*

nam

Lib. III. cap. 25. num. 10. J. B.

<sup>6</sup> Vide Parutam libro v. et VII.

<sup>7</sup> *Fideñates*] Vide Dionysium Halicarnassensem libro III. (c. 6.)

<sup>8</sup> *Latinis*] De Appulis, [Immo Apollanis, DION. HALICARN. *Antiq. Rom.* III. 42.] et Latinis, idem eodem libro III. de Turno Herdonio et Latinis, idem libro IV. (c. 46.) Ammianus libro XXVI. Per-

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ing personal and real pacts. If the transaction be with a free people, it is not doubtful that what is promised is by its nature real, because the subject (the People) is a permanent thing. And even if the state be converted into a kingdom, the league will remain, because the body remains, though the head is changed; and, as we have said, authority exercised by the king does not cease to be the authority of the people. Exception is to be made, if it appears that the cause of the treaty was peculiar to the republican state, as if free cities make a league in defense of their liberty.

2 Even if the compact be made with the king, it is not necessarily personal: for as Pedius and Ulpian say, commonly the person is inserted in the compact, not that it may be a personal compact, but that it may appear on the face of it with whom it was made. And if it be added to the treaty, that it is to be perpetual, that it is made for the good of the kingdom, or with him and his successors, as is commonly added in treaties, or for a definite time, it is plainly real. Such appears to have been the treaty of the Romans with king

cum Philippo Macedonum rege, quod cum Perseus ejus filius ad se pertinere negaret, bellum eo nomine exortum est. Sed et alia verba, et ipsa interdum materia conjecturam suppeditabunt non improbabilem.

3 Quod si pares sint in utrumque conjecturæ, supererit, <sup>ut favorabilia credantur esse realia, odiosa vero personalia.</sup> Federa pacis causa facta, aut commerciorum, favorabilia sunt. Quæ belli causa, non odiosa omnia, ut quidam censem, sed *éπιμαχίαι*, id est, federa tuendi se causa, proprius ad favorem accedunt, *ξυμμαχίαι* magis ad onera. Ad quæ accedit quod in federe ad bellum quodvis, præsumitur ratio habita prudenter et pietatis ejus quicum agitur, ut qui non modo non iuste, sed nec temere bellum suscepturus videretur.

4 Quod vero dici solet, societates morte finiri, huc non adfero: pertinet enim hoc ad societas privatas, et juris est civilis. Jure ergo an injuria <sup>Dec. Lib. I.  
cons. 22.</sup> Fidenates, Latini, Etrusci, Sabini a federe discesserint mortuis Romulo, Tullo, Anco,

*sarum rex manus Armeniis injectabat, eos ad suam ditionem ex integro vocare vi nimia properans, sed iuste; cau-sando quod post Joviani excessum, cum quo fedus firmaverat et pacem, nihil ob-stare debeat, quo minus ea recuperaret que ante ad maiores suos pertinuisse monstrabat.* (Cap. 4.) Similia de Jus-

tiniani pactis cum Saracenis vide apud *Menandrum Protectorem.* (Cap. 12.) Adde quo Helvetii causantur post mortem Henrici III. apud Thuanum libro xcviij. in anno c<sup>lo</sup> Io lxxxix. Vide et insignem locum apud Camdenum in anno c<sup>lo</sup> Io lxxii. ubi de federe antiquo Gallorum cum Scottis.

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Philip, which, when Perseus his son refused to acknowledge as pertaining to him, war arose on that ground. But other words also, and the matter itself, sometimes supply probable conjecture on this subject..

3 If there be equal conjectures each way (for a real and a personal pact), the result must be that favourable pacts are to be believed real, odious ones, personal. Treaties of peace or commerce are favourable: those made with a view to war, not all odious, as some think, since *epimachies*, engagements of support in defensive war, are nearer to favour, *symmachies*, engagements to war in general, nearer to burthens. Add to which, that in a treaty looking to any war, it is presumed that account is had of the prudence and piety of the person treated with, as one who will not undertake a war unjustly, nor even rashly.

4 The maxim, that partnerships are separated by death, I do not here adduce: for that belongs to private partnerships, and is a maxim of Civil Law. Whether the Fidenates, Latins, Etruscans, Sabines, were right or wrong in renouncing their league with the Romans

Prisco, Servio, dijudicari a nobis recte non potest, cum non extant federum verba. Cui non dissimilis est illa apud Justinum controversia, an civitates, quae Medorum tributariæ fuerant, mutato imperio conditionem mutassent. Spectandum enim an in conventione fidem Medorum elegissent. Minime vero admittenda est Bodini argumentatio, federa ad regum successores non transire, quia juramenti vis personam non exeat. <sup>7</sup>Potest quippe juramenti obligatio personam tantum obstringere, et ipsa promissio obligare heredem.

<sup>Lib. v. c. vii.</sup> 5 Neque enim verum est quod sumit, federa jurejurando veluti firmamento inniti, cum plerumque in ipsa promissione satis sit efficacia, cui majoris religionis causa jusjurandum additur. P. Valerio Consule juraverat plebs Romana conventiones se jussu Consulis. Mortuo illi succedit L. Quintius Cincinnatus. Cavillantur Tribuni quidam, quasi non teneatur religione populus. Sequitur Livii judicium: *Nondum hæc quæ hoc tenet sæculum negligentia Deum venerat: nec interpretando sibi quisque jusjurandum et leges aptas faciebant; sed suos potius mores ad ea accommodabant.*

XVII. Sane cum rege initum fedus manet, etiamsi Rex

<sup>7</sup> Confer PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. iv. cap. 2. § 17. cum nostris Notis, alterius Editionis. *J. B.*

" *Hi possessionem habent, jus non habent]* Sic Valens non accepit excusationem Gothorum regis, qui Procopio

purpureæ invasori auxilia se misisse dicebat: excusationem vanissimam dicit Ammianus libro xxvii. (c. 5.) Apud Græcos scriptores eadem historia, sed sub Scytharum nomine: ita enim Gotthos vocabant. Sic Justinianus negabat

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when Romulus, Tullus, Ancus, Priscus and Servius were dead, we cannot judge, not having the words of the treaties extant. Not unlike this is the controversy in Justin, whether the cities which had been tributaries of the Medes, when the empire was changed, had changed their condition. For the argument of Bodinus is by no means to be accepted, that treaties do not pass to the successors of kings, because the force of an oath does not go beyond the person. For the obligation of the oath may bind the person only, while the obligation of the promise may bind the heir.

5 Nor is it true, as he assumes, that treaties depend entirely upon oaths; for the promise of itself gives force to the treaty, and the oath is added only for the sake of religious reverence. So when the Roman people had sworn that they would make a treaty under direction of the Consul, and Valerius the Consul died, some of the Tribunes held that the people was not bound: but Livy judges otherwise: *As yet, he says, men had not become, as now, careless of oaths.*

XVII. If a treaty be made with a king, and he or his successor

idem aut successor regno a subditis sit pulsus. Jus enim regni penes ipsum manet, utcunque possessionem amiserit: quo pertinet Lucani illud de Senatu Romano (Lib. v. vers. 29),

Non unquam perdidit ordo  
Mutato sua jura loco.

XVIII. Contra, si alieni regni invasor volente vero rege, aut oppressor populi liberi, antequam sufficiens populi consensus accedat, bello impetratur, nihil eo fiet contra fedus: quia <sup>hi</sup> possessionem habent, jus non habent. Et hoc est quod Nabidi dicebat T. Quintius: *Amicitia et societas nobis nulla tecum, sed cum Pelope rege Lacedæmoniorum justo ac legitimo facta est.* Qualitates autem istæ in federibus regis, successoris, et similes, jus proprie significant, et odiosa est invasorum causa.

XIX. Tractaverat olim Chrysippus hanc quæstionem, <sup>Apud Plut.</sup>  
<sub>De Stoic.</sub> an præmium promissum ei, qui primus ad metam pervenisset, <sup>Liv. xxxiv.</sup>  
<sub>Repug. p.</sub> debeatur utrique si simul pervenerint, an neutri. Et sane <sup>1045 D.</sup>  
<sup>x</sup> vox primi ambigua est, nam aut eum significat qui omnes antecedit, aut quem nemo. Sed quia virtutum præmia favorabilia sunt, <sup>8</sup> verius est concursuros ad præmium, quanquam

fedus se rupturum cum Gizericho factum, si Gelimerem bello impeteret, qui justo regi Ildericho cum regno libertatem eripuerat. [Apud PROCORIUM, *Vandalie.* i. 9.] Vide Cardinalem Tuschum, pp. verbo Tyrannus concl. 309, num. 6.

Cacheranum decis. LXXIX. num. 35.

<sup>x</sup> Vox primi ambigua est] Vide Albericum de Rosato de Statutis qu. 106. et 107.

<sup>8</sup> Heic potius mihi videtur distinguendum, an actus, cuius præstationi

be expelled by his subjects, the treaty remains valid: for the right of the kingdom remains with him, though he have lost possession. So Lucan, speaking of the Roman Senate in exile.

XVIII. On the other hand, if an Usurper of the kingdom be attacked by its ally with the consent of the true king; or if the oppressor of a free people be so attacked, before the sufficient consent of the people can be obtained; nothing is done against the treaty: for such persons have possession, but not right. As Quintius said to Nabis, *We made no alliance with you, but with Pelops, the just and legitimate king of the Lacedæmonians.* And these qualities, (just and legitimate,) in treaties, refer to the right of the king and his successors: the cause of Usurpers is an *odious* cause.

XIX. Chrysippus had treated this question, Whether a prize proposed to him who reaches the goal first should, if both arrive there at the same time, be given to both or to neither. And in fact, the word *first* is ambiguous: it means either him who gets before all others, or whom none gets before. But because the prizes of excellence are

liberalius <sup>7</sup>Scipio, Cæsar, Julianus his, qui pariter muros as- cenderant, solida præmia tribuerunt. Et haec quidem dicta sunt de interpretatione ea, quæ verborum significationi propriæ vel impropriæ aptatur.

*Everb. t. loc.  
a rat. leg.  
ad restrict.  
et in loc. a  
rat. leg. ad  
extension.*

XX. 1 Est et aliud interpretandi genus, ex conjecturis, extra significationem verborum, eorum scilicet, quibus promissio continetur: idque duplex, vel extendens vel coarctans. Sed quæ extendit interpretatio difficilius procedit, facilius quæ arcit. Nam sicut in rebus omnibus, ut effectus non sequatur, satis est unam deesse causarum, ut nascatur, omnes convenire oportet; ita et in obligatione conjectura extendens obligationem non temere admittenda est: multoque hic difficilius quam in casu, de quo supra dicebamus, ubi verba largam aliquam significationem, etsi minus receptam, admittunt. Nam hic extra verba promittentia conjecturam quærimus, quæ valde certa esse debet, ut obligationem inducat, nec ratio similis sufficit,

præmium promissum est, possit iterari,  
*aut non.* Si prius, jubendi sunt illi, qui præmium ambiant, iterum e. g. cursum instituere. Si posterius, vel ipsum præmium sine incommmodo aut onere nimio multiplicari potest, vel non potest. Si potest, utrique solidum præmium dan- dum, quem uterque meritus sit. Si minus, præmium vel dividi potest, et tunc inter illos sequis partibus dividen-

dum; vel *in commune possideri*, et ita possidebitur; vel neutrum fieri potest, et tunc vel *ex sorte*, vel *ex pacto*, res uni adjudicanda. Quæ omnia fusius deduximus et probavimus in Notis nostris Gallicis. J. B.

<sup>7</sup> *Scipio*] Capta Carthagine nova in Hispania. [Refert id Livius, xxvi. 48. Adde Excerpta ex Dionе Cassio, pag. 602. inter Exc. Vales. J. B.]

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matters of favour; the sounder opinion is, that the two should share the prize: though Scipio, Cæsar, Julian, more liberally gave a full prize to both of those who had mounted the walls at the same time.

And so much of the interpretation which is adapted to the proper or improper signification of words.

XX. 1 There is also another kind of interpretation, from Conjectures, extraneous to the signification of the words in which the promise is made: and this interpretation is twofold, either extending or restricting the meaning. But the interpretation which extends, proceeds more difficultly, than which restricts, more easily. For as in all things, in order that the effect may not follow, it is enough if one of the causes be wanting; and in order that it may take place, it is necessary that all conspire; so in obligation also, a conjecture extending the obligation is not lightly to be admitted; and in this case it is much more difficult than in the case which we spoke of before, to assign to words some large but unusual signification. For here, besides the words of promise, we have to look for some conjecture, which ought

sed oportet eadem sit; nec id semper satis est, ut dicamus ex ratione faciendam extensionem: quia, ut modo dicebamus, sepe ratio ita movet, ut voluntas tamen sit causa per se sufficiens, etiam sine ratione illa.

2 Ut ergo talis extensio recte fiat, opus est ut constet rationem, sub quam venit casus quem volumus comprehendere, esse causam unicam et efficacem, quae promittentem moverit, eamque rationem ab eo consideratam in sua generalitate, quia alioqui promissio futura fuisse iniqua aut inutilis. Hæc quoque pars tractari solet a rhetoribus in loco περὶ ῥῆτοῦ καὶ διανοίας, cuius speciem unam ponunt, quoties semper eandem sententiam dicimus: sed et alter locus κατὰ συλλογισμὸν, per ratiocinationem huc pertinet: nimirum ubi ex scripto ducimus quod scriptum non est, ut loquitur Quintilianus. Et quæ a jurisconsultis traduntur <sup>2</sup>de his, quæ in fraudem fiunt.

\* *De his, quæ in fraudem fiunt]* Bene Seneca excerptis controversiarum vi. 3. *Circumscrip̄io semper crimen sub specie legis involvit: quod appetit in illa, legitimū est: quod latet, insidiosum.* Quintilianus controversia (immo *Declamat.*) cccxlili. *Negue enim unquam occurrit ad hanc legem (nempe de circumscriptione) nisi cum rectum jus nequitia exclusum est.* Exemplum habes apud Plinium *Historiæ Naturalis* libro

xviii: *Quippe etiam lege Stolonis Licinii inclusō modo Io jugerum, et ipso sua lege damnato, cum substituta filii persona amplius possideret.* (Cap. 3.) Est eadem historia apud Valerium Maximum viii. c. vi. 3. Vide aliud exemplum apud Tacitum *Annalium* xv. (Cap. 19) de factis adoptionibus. Aliud in novella Emanuelis Comneni, quæ est in iure Greco-Romano.

to be very certain, which may induce an obligation; nor does analogy suffice, we must have identity of reason: nor is it always enough that we can say the words are to be extended for existing reasons: for, as we have said, reason often so operates, that nevertheless, the will may be a sufficient cause, without any reason.

2 Therefore, in order that such an extension may be rightly made, it is necessary that it should be apparent that the reason under which the case comes which we wish to comprehend, should be the sole and efficacious cause which moves the promiser; and that that reason was considered by him in its generality; because otherwise the promise would have been unjust or useless. This is also treated by Rhetoricians in their sections on *What is said and what is meant*; of which one kind which they mention is, when we always utter the same sentence. But also another section, *On reasoning*, belongs to the subject: namely, when from what is written we deduce what is not written, as Quintilian says: and also what is delivered by the Jurists as to what is done fraudulently.

3 Exemplum sit <sup>a</sup>in pactione, ne quis locus muris cingatur, facta eo tempore cum non aliud esset muniendi genus. Is locus ne aggere quidem cingi poterit, si satis constet prohibendi muros unicam fuisse causam ne muniretur is locus. Vulgo solet exemplum adferri de conditione, si posthumus sit mortuus, ab eo scripta qui posthumum omnino exspectabat, ut sententia dispositionis producatur ad eum casum, si is posthumus natus non esset, quia constet voluntatem loquentis motam fuisse consideratione non existituræ prolis: quod ipsum non apud juris-consultos tantum, sed et <sup>b</sup>apud Ciceronem, et Valerium <sup>c</sup>Maximum invenire est.

Lib. i. 39. et  
ii. 32. de Orat.  
Bruto. c. 52,  
53.

Cap. 20.

4 Cicero causam hanc adfert oratione *pro Cæcina*: *Quid? verbis satis hoc cautum erat? minime. Quæ res igitur valuit? voluntas: quæ si tacitis nobis intelligi posset, verbis omnino non uteremur: quia non potest, verba reperta sunt, non quæ impedirent, sed quæ indicarent voluntatem.* Mox in eadem oratione dicit idem jus esse, ubi perspicitur <sup>c</sup>una at-

<sup>a</sup> *In pactione, ne quis locus muris cingatur, facta eo tempore cum non aliud esset muniendi genus]* Fuscus Arellius in controversia, quæ est apud Senecam decima libro ii. *Hunc enim animum fuisse sine dubio jurantium, ut vi non di-ducerentur, cum illud quoque caverint, ne morte dividarentur.*

<sup>b</sup> *Apud Ciceronem*] Etiam de *Inven-tione* ii. (c. 42.)

<sup>c</sup> Nihil hac de re exstat apud Vale-rium Maximum, nec in Capite *De rati-Testamentis et insperatis*, ubi locus esset aptus, nec alibi, quod sciām. Sed in

Cap. præced. Lib. vii. cap. 7. n. 1. ex-emplum legitur, quod ad hanc regulam potest referri, quamquam contrario modo: nimurum Patris, qui, quum Filium suum in bello occubuisse falso crederet, alios instituerat heredes. Hoc, ut vide-tur, ansam dedit errori Auctoris nostri, memorie vitio duo diversa confundentis.

*J. B.*

<sup>c</sup> *Una atque eadem causa æquitatis]* Sie in sponsam alterius adulterium com-mitti probat Philo de specialibus legi-bus, addita causa: *αλ γάρ ὁμολογεῖ τοῖς γάμοις ισοδυναμοῦσι.* (Pag. 788 A.)

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3 Take an example in an agreement made that no place shall be walled round, made at a time when there was no other way of fortifi-cation. That place cannot even have an earth-work made round it, if it appear that the only cause for prohibiting walls was that the place might not be fortified. An example is often taken in the conditions introduced in the will of a testator in case his posthumous child die, the testament being made by one who fully expected a posthumous child; and the rule is used to extend the dispositions of the testament to the case in which the posthumous child is not born: because it is evident that the will of the testator was moved by the consideration of a progeny which never came into existence: which example we find not only in the Jurists, but also in Cicero and Valerius Maximus.

4 See Cicero in the oration *pro Cæcina*. And hence the form of

que eadem causa æquitatis, id est, rationis quæ sola moverat: Ita interdictum, *unde tu me vi dejeceris hominibus coactis armatisve*, locum habere adversus omnem vim quæ ad caput et vitam pertineat. *Ea enim, inquit, plerumque fit per homines* <sup>Cap. 22.</sup> *coactos armatosque: que si alio consilio, eodem periculo facta sit, eodem jure esse voluerunt.* In declamatione patris Quintiliani exemplum hoc est: *Cædes videtur significare san-* <sup>Decl. 250.</sup> *guinem et ferrum: si quis alio genere homo fuerit occisus,* *ad illam legem revertemur. Si inciderit in latrones, aut in aquas præcipitatus, si in aliquam immensam altitudinem dejectus fuerit, eadem lege vindicabitur qua ille qui ferro percussus sit.* Similis est argumentatio Isæi oratione de Pyrrhi hereditate, cum ex eo quod testamentum Attica lege vetitum esset fieri filia invita, infert, ne adoptionem <sup>2</sup> quidem ea invita permitti.

XXI. Atque hinc solvenda est celebris illa quæstio, quæ et apud Gellium est de mandato, an impleri possit non per <sup>Lub. I. 13.</sup>

*Idem valent sponsalia quod nuptiae.* Sic in lege per Mosem data sub bovis nomine intelliguntur omnia animantia mansueta: sub nomine putei fossa quævis, Exodi xxi. 28. et 35. Chassanæus Catalogo gloriæ mundi v. parte, consid. 49.

<sup>1</sup> Editio Obrechti habet: *Si occiderit in latrinas aut &c.* quod omnino recutius est. J. B.

<sup>2</sup> Locus est pag. 400. Edit. Wech. sed ubi hoc tantum dicitur, Patrem qui solas filias, ex justo matrimonio natas, relinquit, neminem posse adoptare, he-

redemque scribere, nisi cui prius filiam in matrimonium collocaverit, juxta Legem Athenis constitutam. Deceptus est Auctor ab Interprete Latino infelissimo, qui ἐπὶ ταῦταις vertit, *in illarum [filiarum] arbitrio: et ἀνετρέψων, insciis filiabus, non consultis:* quum haec significant, non sine illis uxoribus ductis ab eo, qui testamento heres instituitur. Adde Viri Eruditissimi Jac. Perizonii *Dissert. Triad. Diss.* II. pag. 60, et seqq. ubi recte locum exponit; ut dudum post haec scripta animadvertis. J. B.

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interdict, *Unde tu me vi dejeceris hominibus coactis armatisve*, will hold against all force endangering life, though there may not be a body of armed men. As Cicero says, the legal effect is the same. So Quintilian says, *Murder* seems to imply steel weapons and blood; but if any one is killed in any other way, we still recur to that law: for instance, if the man be thrown from a precipice. So Isæus, because by the Attic Law a testament could not be made [by a father having no son] against the will of a daughter, infers that an adoption could not be made without her consent.

XXI. And on these principles is to be solved that celebrated question which we have in Gellius, about a commission; whether it may be fulfilled, not by the identical thing directed, but by another equally useful or more useful than that which was enjoined by him

idem, sed per aliud æque utile, aut utilius quam erat id quod mandator præscripserat. <sup>3</sup> Id enim ita demum licet, si constet quod præscriptum erat, non præscriptum fuisse sub speciali sua forma, <sup>4</sup> sed sub consideratione generaliore, quæ aliter quoque obtineri possit: quomodo eum qui fide jubere erat jussus, mandare posse creditori, ut tertio pecuniam numeret, a Scævola responsum est. Ceterum ubi de eo non satis constat, retinendum est quod apud Gellium eo loco legitur, dissolvi imperantis officium, si quis ad id, quod facere jussus est, non obsequio debito, sed consilio non desiderato respondeat.

*L. ult. D.  
Mandat.*

XXII. Restrингens interpretatio extra significationem verborum quæ promissionem continent, aut ex defectu petitur originario voluntatis, aut ex casus emergentis repugnantia cum voluntate. Defectus voluntatis originarius intelligitur ex absurdo, quod alioqui evidenter sequeretur; ex cessatione rationis <sup>5</sup>quæ sola plene et efficaciter movit voluntatem; et ex materiæ defectu. Primum in eo fundamentum habet, quod nemo credendus est velle absurdæ.

<sup>3</sup> Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. v. cap. 4. § 5. *J. B.*

<sup>4</sup> *Sed sub consideratione generaliore]* Quintilianus *Controvers.* [Immo *De clam.*] cclvii. *Servi quedam liberius*

*ex bona mente faciunt, et aliquando indicium fidei putant pretio emta mancipia, non paruisse.* Exemplum habes in excerptis legationum in illa parte, quod modolegationes obvundæ accipiendæque

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who gave the commission. For it is lawful to do so, if it be clear that what was prescribed was not prescribed under its special form, but under a more general purpose, which might also be obtained in some other way: thus, he who was ordered to give security for a loan to be made to a third person, might, instead, give an order to the lender to make the payment to the third person; as Scævola held. [*Dig. xvii. 1.*] But when that is not clear, we must hold, as Crassus says, in Gellius in that place, that the demand of the superior is disregarded, if any one, in place of discharging his commission as directed, respond by advice which was never asked for.

XXII. An interpretation restricting a promise, extraneously to the signification of the words which contain the promise, is derived either from original limitation of the will [of the promiser], or from the repugnance with such will which comes to view in some occurring case. A limitation of the original will is understood—from the absurdity which would evidently follow, if it were not so limited;—from the cessation of the reason which alone fully and efficaciously moved the will;—and from the defect of the matter.

The first restriction has its ground in the consideration, that no one is supposed to intend what is absurd.

XXIII. Secundum, ex eo quod contentum in promissione, ubi ratio talis additur, aut de ea constat, non consideratur nude, sed quatenus sub ea ratione venit.

XXIV. Tertium, in eo quod materia de qua agitur semper intelligenda est observari animo loquentis, etiamsi verba latius pateant. Hæc quoque interpretandi ratio a Rhetoribus tractatur in loco *περὶ ῥῆτοῦ καὶ διανοίας*, et titulum habet, cum dicitur non semper eadem sententia.

XXV. 1 Sed de ratione notandum est, sub ea comprehendendi sœpe quasdam res non secundum existentiam, sed secundum potentiam moraliter consideratam, quæ ubi locum habet, restrictio facienda non est. Sic si cautum sit, ne exercitus aut classis aliquo ducatur, non poterit duci, etiam animo non nocendi. Quia in pactione non certum damnum, sed periculum qualemque spectatum est.

2 Solet et hoc disputari, an promissa in se habeant tacitam conditionem, si res maneat quo sunt loco: quod negandum est, nisi apertissime pateat statum rerum præsentem in

sint; et in iis quæ Johannes Justinianorum ducum unus fecit contra Belisarii verba, *Gothicorum* II. et IV. [Scilicet apud Procop. Lib. II. c. 10. et Hist.

*Misc. c. 23.]*

*et Quæ sola plene et efficaciter movit voluntatem] Exemplum in l. Adigere 6. § quamvis. 2. D. de jure patronatus.*

XXIII. The second in this, that what is contained in the promise, when such a reason is added, or the reason is certain, is not considered nakedly, but so far as it comes under that reason.

XXIV. The third in this, that the matter which is dealt with is always supposed to be present to the mind of the speaker (the promiser), although the words have a wider signification. This way of interpretation also is treated by writers on Rhetoric in the Section, *Of what is said and what is meant*; and has for its Title, *When the same words are used, but not in the same sense*.

XXV. 1 But with regard to the reasons [of promisers, as here applied], it is to be noted that there are comprehended therein many things, not as to whether they exist, but as to their power morally considered; and when this holds, the restriction is not to be introduced. Thus if it be stipulated that an army or a fleet is not to be moved into a certain place, it must not be moved thither, though it be done with no purpose of attack. For in the compact, it was not a certain damage, but a danger of any kind which was considered.

2 This also is often disputed, whether promises have in themselves this tacit condition, If things remain in their present state. And this is to be denied, except it be quite clear that the present

Pascal. 29.  
c. 57. unica illa quam diximus ratione inclusum esse. Sic passim in historiis legimus legatos a suscepto itinere domum rediisse deserta legatione, quod res ita mutatas intelligerent, ut tota legationis materia aut causa cessaret.

XXVI. 1 Repugnantia casus emergentis cum voluntate solet et ipsa ab oratoriæ artis magistris referri ad eum, quem dixi locum περὶ ρῆτοῦ καὶ διανοίας. Est autem duplex: nam aut voluntas colligitur ex naturali ratione, aut ex alio signo voluntatis. Dijudicandæ voluntati ex naturali ratione Aristoteles, qui hanc partem accuratissime tractavit, propriam virtutem tribuit in intellectu γνώμην, sive εὐγνωμοσύνην, id est, *æquiprudentiam*, in voluntate vero ἐπιείκειαν, id est, *æquitatem*, quam sapienter definit, correctionem ejus <sup>‘</sup>in quo lex deficit ob universalitatem: quod ad testamenta quoque et pacta suo modo referri debet. Nam quia casus nec prævideri omnes possunt nec exprimi, ideo libertate quadam opus est eximendi casus, quos qui locutus est si adesset eximeret: non tamen temere; id enim esset dominum se facere actus alieni; sed ex sufficientibus indiciis.

<sup>‘</sup> In quo lex deficit ob universalita- lege, inquis, nihil excipitur, sed multa tem] Seneca iv. controversia 27. In quamvis non excipiatur intelliguntur:

state of things was included in that sole reason of which we have spoken. Thus we constantly read in history of ambassadors who gave up their commission and returned home, because they understood that the state of things was changed, so that the whole matter or cause of the embassy ceased. .

XXVI. 1 The repugnance of an occurring case with the will [of the promiser] is commonly, in writers on oratory, referred to the Section of which I have spoken, *Of what is said and what is meant*. It is twofold: for the will is either collected from natural reasons, or from some other sign of the will. Aristotle, who has most correctly treated this part, ascribes to the intellect a peculiar power for judging of the will, which he calls *γνώμη*, or *εὐγνωμοσύνη*, that is *equitable insight*; and to the will he ascribes a corresponding power, *ἐπιείκεια*, *equity*, which he ably defines, The correction of the law, when it is defective from the universality of its expression\*. And this equity is also to be applied to testaments and compacts in an appropriate manner. For since all cases can neither be foreseen nor expressed, there is a necessity for some liberty for excepting cases which he who has spoken would except if he were present. But this is not to be done rashly; (for that would be for the interpreter

\* See E. M. 401.

2 Certissimum indicium est, si quo casu sequi verba illicitum esset, id est, pugnans cum naturalibus aut divinis præceptis. Talia enim, cum obligationis capacia non sint, eximenda sunt necessario. *Quædam*, ait Quintilianus pater, *etiamsi Decl. 315. nulla significatione legis comprehensa sint, natura tamen excipiuntur.* Ita qui promisit depositum gladium reddere, non reddet furenti, ne aut ipsi periculum creet, aut aliis innocentibus. Sic nec reddetur res deposita ei, qui depositus: si dominus eam repeatat. *Probo*, inquit Tryphoninus, *hanc esse L. bon. fid. justitiam, quæ suum cuique ita tribuit, ut non distrahatur 32. D. depos.* ab ullius personæ justiore repetitione. Ratio est, quia, ut alibi notavimus, introducti semel dominii ea vis est, ut rem domino cognito non reddere omnino injustum sit.

XXVII. 1 Secundum erit indicium, si verba sequi non quidem per se et omnino illicitum sit, sed æque rem æstimanti nimis grave atque intolerabile: sive absolute spectata conditio humanae naturæ, sive comparando personam et rem, de qua agitur, cum ipso fine actus. Sic qui rem ad dies aliquot commodavit, intra eos dies repeterè eam poterit, si ipse valde

*et scriptum legis angustum est, interpre- festa sunt ut nullam cautionem deside-  
tatio diffusa: quædam vero tam mani- rent.*

to determine the acts of another); but on sufficient indications.

2 The most certain indication is, if in any case to follow the words would be unlawful, that is, at variance with the precepts of Natural or Divine Law. For such cases, since they cannot impose an obligation, must necessarily be excepted. Some things, says Quintilian the father, though they are not comprehended in any terms of the law, are by their nature excepted. Thus he who has received a sword as a deposit, promising to give it up on demand, is not to give it up to a madman, in order that he may not create danger to himself or to other innocent persons. Tryphoninus says, *I agree that it is justice to give to each his own, but in such a way that it may not be again demanded on a better claim by some other person.* The reason is, because, as we have elsewhere noted, the force of ownership once introduced, is such that not to restore a thing to the owner, when known, is altogether unjust.

XXVII. 1 A second indication of a reason for deviating from the words of the promiser, in our interpretation, is, if to follow the words will be, not indeed quite unlawful, but to a person fairly estimating the matter, grievous and intolerable: either looking absolutely at the condition of human nature, or comparing the person and thing in question with the end of the act. Thus he who has lent a

Molin. disp.  
294.  
Sylv. Verb.  
commod. n.  
4. Lett. l. 11.  
c. 27. dub. 5.

Ang. ad.  
L. 7. ad L.  
Rhod.  
Vasq. contr.  
IIL c. 31.

De Offic. I. 10.

egeat: quia actus tam benefici ea est natura, ut non credendus sit quisquam ad magnum suum incommodum se voluisse obligare. Sic qui auxilium federato promisit, excusabitur quamdiu ipse domi periclitatur, in quantum copiis opus habet. Et <sup>a</sup> concessio immunitatis vectigalium et tributorum intelligetur de quotidianis et anniversariis, non de iis, quæ summa necessitas exigit, et quibus carere respublica non potest.

2 Ex quibus apparet nimis laxe dictum a Cicerone, non servanda promissa quæ sint iis quibus promiseris inutilia, nec si plus tibi noceant quam illi prosint cui promiseris. Nam res utilis sit futura ei, cui promissa est, judicare promissor non debet, nisi forte in casu furoris, de quo supra diximus: et ut promissum promissorem non obliget, non satis est quodlibet nocumentum in promissorem, sed tale oportet sit, <sup>b</sup> quod pro natura actus credi debeat exceptum. Sic qui operas vicino ad dies aliquot promisit, non tenebitur, si eum morbus santicus

<sup>a</sup> Concessio immunitatis] Vide Rosenthalium *de Feudis* cap. v. concl. LXXXVI. num. 2. Heig. *Illustrum XVIII.* num. 16. parte i. Gothmannum cons. xi. 32. Claram § feendum. XXIX. 2. Andream Knich *de Vestitis Pactis*, parte ii. c. 5. num. 20. Henricum Bocer *de Collectis* cap. iv. 12.

<sup>b</sup> Quod pro natura actus credi debeat exceptum] Vide Carolum Molinæum *ad Consuetudines Parisienses* tit. i. § 2.

gl. iv. n. 3. Ferd. Vasquium *de Successionum Creatione* libro II. § xviii. num. 80. Antonium Fabrum *rerum in Sabaudia judicatarum* libro IV. tit. 30. Zasiom in l. stipulatio hoc modo. 61. num. 3. de verborum obligationibus. Adde c. quemadmodum. 25. *de jure rurando et Alciatum ad c. cum contingat*, eodem titulo.

<sup>c</sup> Quod apud Senecam legimus] Ejusdem hæc sunt, capite xxxix. Lib. IV. de

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thing for a few days, may demand it back again within that time, if he himself have great need of it: because this [lending] is an act so beneficial in its nature, that it is not to be supposed that any one would thereby bind himself to his own great inconvenience. Thus he who has promised assistance to a federate ally, will be excused as long as he is in danger at home, so far as he has occasion for his powers. And a concession of immunity from tax and tribute must be understood with reference to daily and yearly taxes, not to those which some extreme necessity requires, and which the State cannot do without.

2 Whence it appears that Cicero spoke too laxly, when he said that your promises are not to be kept which are useless to those to whom they are made; nor if they harm you more than they advantage them. For whether the thing will be useful to him to whom it is promised, the promiser is not the judge, except perhaps when the promisee is mad, of which case we have spoken above: and in order

patris aut filii detineat. Et hoc recte Cicero de *Officiis* primo: <sup>cap. x.</sup>  
*Si constitueris te cuiquam advocatum in rem præsentem esse venturum, atque interim graviter ægrotare filius caeperit, non sit contra officium non facere quod dixeris.*

3 In eundem sensum accipendum, nec ultra trahendum est, <sup>1</sup>quod apud Senecam legimus: *Tunc fidem fallam, tunc De Beneſ. iv.  
 inconstantiae crimen audiam, si cum omnia eadem sint, quæ  
 erant promittente me, non præstitero promissum, alioqui  
 quicquid mutatur, libertatem facit de integro consulendi, et  
 meam fidem liberat. Promisi advocationem: postea apparuit per illam causam præjudicium in patrem meum quæri: promisi me peregre una iturum: sed iter infestari latrociniis nuntiatur. In rem præsentem venturus fui: sed æger filius, sed puerpera uxor tenet. Omnia esse debent eadem quæ fuerint cum promitterem, ut promittentis fidem teneas. Omnia intellige, pro actus ejus de quo quæritur natura, ut jam modo exposuimus.*

*Beneficiis: Ad cænam quia promisi ibo, etiam si frigus erit, non quidem si nives cadent. Surgam ad sponsalia, quia promisi, quamvis non concozerim, sed non si febricitavero. Sponsum descendam, quia promisi: sed non si spondere in incertum jubebis, si fisco obligabis. Subest, inquam, tacita exceptio, si potero, si debebo, si hæc ita erunt. Effice ut idem status sit cum erigitur, qui fuit, cum promitterem: destituere levitas non erit, si aliquid intervenit novi: quid miraris, cum conditio promittentis mutata sit, mutatum esse consilium? eadem mihi omnia præsta et idem sum. Vadimonium promittimus, tamen deseritur. Non in omnes datur actio, deserentem vis major excusat. Usi sepe hoc effugio Angli. Vide Camdenum in anno c10 Iю xciv. tum in controversia cum Batavis, tum in altera cum Anseaticis.*

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that a promise may not oblige the promiser, it does not suffice that it brings some harm to the promiser; but it must be such harm as according to the nature of the act must be supposed to be excepted in the promiser. Thus he who has promised his neighbour so many days' labour, is not bound if a critical and dangerous disease of his father or his son keeps him away. So Cicero in his *Offices*. (I. 10.)

3 What Seneca says is to be taken in the same sense, and not to be pushed further: *I must keep my promise if all things are the same: but if anything be changed, I am at liberty to revise my decision. Thus I promised to advocate a cause; but it appears that the cause is intended to injure my father: I promised to accompany one on a journey; but it appears that the road is infested with robbers: I was to come at a certain time; but my son is ill, my wife is in child-birth. All must be the same as it was when I promised, to oblige me to keep my word. Understand, all things according to the nature of the act in question, as we have just explained.*

## CAPUT XVII.

### DE DAMNO PER INJURIAM DATO, ET OBLIGATIONE QUÆ INDE ORITUR.

- I. *Culpam obligare ad restitu-  
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- II. *Damnum intelligi quod pug-  
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I. SUPRA diximus ejus, quod nobis debetur, fontes esse  
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### CHAPTER XVII. Of Damage with Wrong, and the Obligation thence arising.

I. We have said above that there are three sources of debts due to us; Pact, Wrong, Law. Of pacts we have sufficiently treated: we come to what by Natural Law is due on account of Wrong. We have given the name of *wrong* to every fault, either of doing or of omission, which is at variance with what men ought to do, either on the ground of their common connexion, or of some special quality. From such

debetur. Maleficium hic appellamus culpam omnem, sive in faciendo, sive in non faciendo, pugnantem cum eo, quod aut homines communiter, aut pro ratione certæ qualitatis facere debent. <sup>a</sup>Ex tali culpa obligatio naturaliter oritur, si damnum datum est, <sup>b</sup>nempe ut id resarciatur.

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2 At ex sola aptitudine, quod jus minus proprio dicitur, et ab assignatrice justitia spectatur, non oritur verum dominium, ac proinde restitutionis obligatio: quia non id alicui

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fault arises by Natural Law an obligation, if the wrong be accompanied with damage: namely, the obligation of repairing the wrong.

II. 1 Damage, *damnum* (perhaps from *demo*), is when a man has less than what is *his*, whether it be *his* by mere nature, or by some human act in addition, as ownership, pact, law. Things which a man may regard as *his* by nature are life, not indeed to throw away, but to keep, his body, limbs, fame, honour, his own acts. What is *his* by ownership and pact, and how, we have shewn above, both as to things, and as to right over others' acts. In like manner the law determines for each what is *his*, for the law can do more for a man than he can do for himself. Thus a ward has a right to a certain care and diligence from his guardian; the State, from a magistrate; and not only the State, but each citizen, as often as the law expressly, or by clear implication, marks such a consequence.

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Nic. v. 4. suum est ad quod aptus est : πλεονεκτεῖ οὐδὲν, ait Aristoteles, ὁ οὐ βοηθός χρήμασι δί' ἀνελευθερίᾳν. *Contra proprie dictam justitiam nihil committit, qui pecunia sua alteri non succurrit, præ tenacitate.* Cicero pro Cn. Plancio : *Est hæc conditio liberorum populorum, posse suffragiis vel dare, vel detrahere quod velit cuique ; et tamen mox subdit, accidere ut populus faciat, quod velit, non quod debeat, voce debendi sumta in laxiore significatu.*

III. Sed cavendum hic, ne confundantur quæ diversi genneris sunt. Nam cui magistratus collatio mandata est, is reipublicæ tenetur ad eligendum eum qui dignus sit, et ad hoc exigendum respublica jus habet proprium : quare si ex indigni electione damnum fecerit respublica, ille resarcire tenebitur. Sic etiam civis aliquis non indignus, etsi jus proprium ad officium aliquid non habeat, habet tamen verum jus petendi juxta alios : in quo jure si per vim aut dolum impediatur, jam non totius rei expeditæ sed incerti illius damni æstimationem exigere poterit. Simile erit in eo, cui ne quid legaret testator, vi vel dolo fuit impeditus : nam capacitas legati jus quoddam

Thom. et Caj. 2. q. 62.  
art. 2.  
Soto, iv. q. 6.  
Lerr. ii. 12.  
dub. 18. et  
Covar. ad c.  
Pecor. p. 2. § 7.

<sup>2</sup> Vide quæ fuse notavimus ad Libellum PUFENDORFI, *De Offic. Hom. et Civ.* Lib. i. cap. i. § 27. tertius et quartus Edd. ubi de concursu ad facinus alienum accuratius, quam uteisque Auctorum nostrorum, egimus. J. B.

<sup>c</sup> *Laudat]* Totilas in oratione ad Gotthos, apud Procopium *Gotthicorum* III. ὁ γὰρ ἐπαιέστας τὸν δεδράκοτα, οὐδέν τι ἡσσον τῶν πεπραγμένων αὐτονύμων γίνεται. *Nam qui facientem aliquid laudat, et ipse rei factus auctor*

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ownership, and the consequent obligation of restitution : for that is not any one's to which he has merely a claim. *A man does not wrong any one when he refuses to give from illiberality*, says Aristotle. So Cicero.

III. But here we must take care not to confound things of diverse kinds : for he who has to appoint a magistrate is bound to the republic to elect one who is worthy ; and the republic has a right to demand this : and therefore, if by an unworthy election he has produced damage to the republic, he is bound to make it good. So any citizen, not unworthy, although he has not a right to any office, yet has a right to be a candidate along with others ; and if he is disturbed in this right by fraud or violence, he may demand, not the whole value of that which he sought, but the estimated value of his loss. So in the case of him to whom a testator was by force or fraud prevented from leaving a legacy ; for the capacity to receive a legacy is a certain right, which has for its consequence this, that to impede the liberty of the testator as to that right, is a wrong.

IV. A person may have less than his own, and so, have suffered

est, cui id est consequens, ut libertatem testatoris in eo impediare injuria sit.

IV. Minus autem quis habere, ac proinde damnum fecisse intelligetur, non in re tantum, sed et in fructibus qui proprie rei fructus sunt, sive illi percepti sunt, sive non, si tamen ipse eos percepturus fuerat, deductis impensis quibus res melior facta est, aut quæ ad fructus percipiendos fuerunt necessariæ, ex regula quæ nos vetat locupletiores fieri cum aliena jactura.

V. Sed et spes lucri ex nostro æstimabitur, non ut illud ipsum, sed secundum propinquitatem ad actum, ut in semente L. in quant.  
73. § mag. 1.  
D. ad Leg.  
Falcid. spes messia.

VI. Tenentur autem, præter ipsum qui per se et a jure <sup>Thom. 2. 2.  
62. art. 4.  
Soto. iv. q. 6.  
art. 4.</sup> damnum dat, alii quoque faciendo aut non faciendo. <sup>2</sup>Faciendo alii primario, alii secundario: primario, qui jubet, qui consensum requisitum adhibet, qui adjuvat, qui receptum præstat, aut qui alio modo in ipso crimine participat.

VII. Secundario, qui consilium dat, <sup>Cap. 12.</sup> laudat, assentatur. *Quid enim interest <sup>d</sup>inter suasorem facti et probatorem?* ait Cicero Philippica secunda.

VIII. Non faciendo item primario aut secundario; pri-  
*habendus est.* (Cap. 25.) Ulpianus in Lib. i. c. de servo corrupto: *Et si erat seruus omnimodo fugitus, vel furtum facturus, hic vero laudator ejus propensi fuerit, tenetur: non enim oportet laudando augeri malum.*

<sup>d</sup> *Inter suasorem facti et probatorem]*  
Applicat hoc dictum Probo prefecto Ammianus, libro xxvii. (cap. 2.) Lege Langobardica, Lib. i. tit. 4. etiam consulens ad compositionem vocatur. Vide Rom. i. in fine, et ibi veteres scriptores.

loss, not only in the thing which belongs to him, but in the produce of the thing, whether he has collected such produce, or only would have collected it: and his loss consists in that produce, minus the expense of improving the thing, and of collecting the produce.

V. Also the hope of gain from a thing which is ours may be estimated, not as what it is simply, but according to its prospect; as the hope of the harvest in the sower.

VI. Besides him who immediately causes the loss, others may be bound, either by doing or not doing.

By doing, some primarily, others secondarily: Primarily, he who commands it, who gives the requisite consent, who helps, who receives what is taken, or who participates in the crime in any other way.

VII. Secondarily, who advises, praises, approves. See Cicero.

VIII. Also by not doing, primarily and secondarily. Primarily, when one who by his proper right ought to forbid the act, or help the person wronged, does not.

mario, qui cum ex jure proprio dicto debeat vetare praecepto, aut opem ferre ei cui fit injuria, id non facit. Is Chaldaeo Paraphrastæ Levit. xx. 5. *Typ* obfirmator dicitur.

*Less. II. 13.  
dub. 10.*

IX. Secundario, qui aut non dissuadet cum debeat, aut factum reticet quod notum facere debebat. Illud autem debere in his omnibus referimus ad jus proprium quod justitia expletrix respicit, sive illud ex lege sive ex qualitate exoritur. Nam si debeat ex caritatis norma, peccabit quidem omittendo, non tamen ad reparationem tenebitur, cujus origo est jus aliquod proprium, ut ante diximus.

*Thom. 2. 2.  
62. art. 6.  
Soto, iv. q. 7.  
art. 3.*

X. Sciendum quoque hos omnes quos diximus ita teneri, si vere causa fuerint damni, id est, momentum attulerint, aut ad totum damnum, aut ad partem damni. Nam saepe accidit in agentibus vel negligentibus secundarii ordinis, interdum etiam in quibusdam qui sunt ordinis primarii, ut etiam sine eorum actu aut neglectu is qui damnum dedit certus fuerit id ipsum dare: quo casu illi quos dixi non tenebuntur. Quod tamen non ita intelligendum est, ut si alii defuturi non fuerint, puta qui suaderent, aut juvarent, non teneantur qui suaserint, aut juverint, si absque ope aut consilio qui dedit damnum da-

*Cajet. ad q.  
62. art. 6.  
Medin. q. 7.*

\* Aut opem ferre ei cui fit injuria, id non facit] Nicetas Choniates Michaelis Comneno: δέ ἐμπρησμός, οὐ μόνον τοῦ ἀνάψαυτος, δλλά καὶ τοῦ κατασθέσαι δυναμένου, δράσαι δέ τι τοιοῦτον  
ὅλως μή βουληθέντος. Incendium non ei tantum imputatur qui faciem intulit, sed et ei, qui prohibere cum posset, omnino noluit. (Lib. i. c. 3.)

\* Si totus actus ab ipsis, quamquam

IX. Secondarily, he who does not dissuade when he ought, or keeps silence about a fact which he ought to make known. And this ought, in all these cases, we refer to proper rights and explanatory justice, whether arising from law or quality. For if he ought by the law of charity only, he sins indeed in not doing it, but is not held to reparation; for this has its origin in a proper right, as we have said.

X. It is to be noted also, that all those of whom we have spoken are bound if they were really the cause of the damage, that is, if their influence shared in producing either the whole loss or a part of it. For it often happens in agents or *negligents* of the secondary order, and sometimes in those who are of the first order, that even without their act or neglect, the person who committed the damage was certain to commit it: in which case they will not be liable. Which answer is not so to be understood as, that if others would not have been wanting to persuade or assist, those who did persuade or assist are not liable; if without suasion or assistance the author of the damage would not have done it. For those others who should have persuaded

turus id non fuisset. Nam et illi alii si suassissent aut adjuvissent, tenerentur.

XI. Tenentur autem primo loco ii, qui imperio aut alio modo aliquem impulerunt ad factum: his deficientibus patrator facinoris: et post eum ceteri, in solidum singuli qui ad actum causam dederunt, <sup>Less. ii. 13.  
dub. 5.  
Ibid. dub. 4.</sup> 'si totus actus ab ipsis quamquam non solis processit.

XII. Qui vero de actu tenetur, <sup>g</sup> simul tenetur de his quae illum ex actus vi sunt consecuta. <sup>h</sup> In Senecæ controversia quadam hoc tractatur in specie platani incensæ, ex qua domus arserat, ubi hanc ponit sententiam: *Etiamsi partem damni dare noluisti, in totum quasi prudens dederis tenendus es; ex toto enim noluisse debet, qui imprudentia defenditur.* Ariarathes Cappadocum rex eo quod Melani amni exitum per lasciviam obstruxerat, cum ejus perrumpentis impetu elatus Euphrates rapta parte Cappadocum terræ, magna et Galatis et Phrygibus damna intulisset, permisso Romanis judicio, talents trecentis dispendium sarcivit. <sup>Strabo, xii.  
530.</sup>

XIII. Exemplo haec sint. Homicida injustus tenetur solvere impensas, si quae factæ sunt in medicos, et iis quos occisus

*non solis, processit]* Lex Langobardica, Lib. i. tit. ix. 5.

si servus servum. 27. § si quis insulam 8. D. ad l. Aquiliam.

*g Simul tenetur de his quae illum ex actus vi sunt consecuta]* Vide Thomam primæ secundæ quæst. xx. art. 5 et l.

*h In Senecæ controversia]* Excerptis v. 5.

or assisted would have been liable.

XI. Those are liable in the first place, who, by command, or in any manner, impel any one to the act: failing these, the perpetrator of the deed; after him, the rest in any way concerned; and those jointly who gave cause to the act, if the whole act proceeded from them, though not from them alone.

XII. They who are liable for the act, are also liable for the natural consequences of the act. Seneca puts a case of a man setting fire to a plane-tree, by which a house was burnt, and holds him liable. [See.] Ariarathes, having wantonly stopped the course of the river Melanus, caused a flood of the Euphrates, which produced great damage in Galatia and Phrygia: and the matter being referred to the Romans, paid 300 talents to make good the loss.

XIII. Take these examples: A person who unlawfully kills another is bound to pay the expenses of physicians, if any, and of those who depended for subsistence on the person killed, his parents, wives, children, as much as their hope of support was worth, con-

Diod. iv. 31. alere ex officio solebat, puta parentibus, uxoribus, liberis dare tantum, quantum illa spes alimentorum, ratione habita æstatis occisi, valebat: sicuti Hercules legitur Iphiti a se occisi liberis mulctam pependisse, quo facilius expiaretur. Michael Ephesius Cap. 2. ad quintum Nicomachiorum Aristotelis: ἀλλὰ καὶ ὁ φονευθεὶς ἔλαβε τρόπον τινά. ὁ γὰρ οὐ γυνὴ οὐ παιδες, οὐ οἱ συγγενεῖς τοῦ φονευθέντος ἔλαβον, τρόπον τινὰ ἐκείνῳ δέδοται. Sed et qui occisus est, accipit aliquo modo. Quare enim uxor ejus et liberi et cognati accipiunt, ipse quodammodo accipit. Loquimur de homicida injusto, id est, qui non habuit jus id faciendi unde mors sequitur. Quare si quis jus habuerit, sed in caritatem peccaverit, ut qui fugere noluit, non tenebitur. Vitæ autem in libero homine æstimatio non fit; secus in servo, qui vendi potuit.

L. uit. D. de his qui effud. vel def. Less. H. 10. dub. 6. XIV. <sup>1</sup>Qui mutilavit, similiter tenebitur ad impensas et ad æstimationem ejus quod jam, qui mutilatus est, minus poterit lucrari. Sed sicut ibi vitæ, ita et hic cicatricis in libero homine æstimatio non fit. De conjectione in carcerem idem dicendum.

XV. Sic adulter et adultera tenentur non tantum indemnum præstare maritum ab alenda prole, sed et legitimis liberis

<sup>1</sup> Qui mutilavit, similiter tenebitur ad impensas et ad æstimationem ejus, quod jam qui mutilatus est minus poterit lucrari] Idem apud Hebreos servatum, Baba Kama, cap. 8. § 1. et apud Anglos et Danos, quorum fedus vide apud

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sidering the age of the person killed. So Hercules paid a fine for the death of Iphitus. So Michael Ephesius on Aristotle. We say *unlawfully kills*; for if a person was acting lawfully, as if he was assailed and did not run away, though he may have sinned against charity, he is not liable. The life of a free man cannot be valued: it is different in a slave, who may be sold.

XIV. If a person maims another, he is similarly liable to the expenses, and to the estimated value of how much less the maimed man can earn. But as the free man's life, so his wound, is not capable of estimation. The same is to be said of unjust imprisonment.

XV. The adulterer and adulteress are liable not only to indemnify the husband for the expenses of rearing the progeny, but also to repay the legitimate offspring what loss they suffer from the concourse of the offspring so arising in the inheritance.

He who deflowers a virgin by force or fraud is bound to pay her as much as she loses by the diminished hope of marriage; and even to marry her if it was by such a promise that he became master

repondere, si quod damnum patiuntur ex concursu ita susceptæ sobolis ad hereditatem. Qui virginem imminuit vi, aut fraude, Lem. II. 10.  
dub. 2. et 3. tenetur ei rependere quanti minoris ipsi valet spes nuptiarum: imo et ducere tenetur, si ea promissione corporis usuram impetraverit.

XVI. Fur et raptor tenentur rem subtractam reddere Ibid. c. 12.  
dub. 17. cum suo incremento naturali, et cum sequente damno aut cessante lucro: et si res perierit, estimationem non summam, non infimam, sed medium. In hac classe ponendi et illi qui legitima vectigalia fraudant. Similiter tenentur qui judicio Lem. II. 33.  
dub. 8.  
Covar. c. Pec.  
p. 2. § 3. injusto, accusatione injusta, testimonio injusto damnum deruntur.

XVII. Sed et qui contractui aut promissione causam dedit dolo, vi, aut metu injusto, tenetur eum quicum actum est in integrum restituere, quia ille jus habuit, tum ne decipereatur, tum ne cogeretur; illud ex natura contractus, hoc ex naturali etiam libertate. His annumerandi sunt qui id quod Covar. c. Pec.  
p. 2. § 3. ex officio facere tenebantur facere noluerunt, nisi pecunia accepta.

XVIII. At qui causam dedit, cur vim pati, aut metu cogi debeat, habet quod sibi imputet: nam involuntarium ex Lem. II. 17.  
dub. 6. voluntario ortum habens moraliter pro voluntario habetur.

doctissimum Pontanum dissertatione de mari. [Discuss. Historic. &c. Lib. II. cap. 21. ubi tamen nil legitur, quod ad rem faciat. Est tantum aliquid de mulcta ab homicida heredibus occisi pendenda, pag. 143. J. B.]

of her person.

XVI. The thief and the robber are bound to restore the thing subtracted, with its natural increase, and with the consequent loss, or consequent cessation of gain; and if the thing have perished, its estimated value, not the highest, nor the lowest, but the medium value. In this class are to be placed those who defraud the lawful taxes. Also those are liable who by false testimony have occasioned damage in an unjust sentence, or an unjust accusation.

XVII. Also he who has caused a contract or promise by fraud, trick, or violence, is liable to restore to his original condition him who has been thus dealt with: because he had a right not to be deceived, and not to be forced: the former, from the nature of a contract, the latter from natural liberty as well. To these are to be reckoned those who would not do, except for money given, what they were bound to do for their office.

XVIII. He who gave cause why he should suffer force, or be compelled by fear, has himself to blame for what happens: for

**XIX.** At gentium consensu sicut introductum est, ut bella omnia summæ potestatis auctoritate utrinque gesta et indicta pro justis habeantur, quoad effectus externos, qua de re infra dicemus: ita et hoc, ut talis belli metus hactenus pro justo habeatur, ne quod ita obtentum est repeti possit. Atque hoc sensu admissi potest distinctio Ciceronis, inter hostem, quicum multa jura habemus, ut ait, communia, ex gentium consensu scilicet, et piratas ac latrones. Nam hi si quid metu expresserunt repeti potest, nisi jusjurandum intercesserit: quod illi, non item. Quare quod Polybio videtur justam fuisse Carthaginiensibus causam belli Punici secundi, quod Romani ab ipsis mercenariorum seditione occupatis bello denuntiato Sardiniam insulam et pecuniam expressissent, habet naturalis æquitatis aliquam speciem, sed a jure gentium abit, ut alibi explicabitur.

**XX. 1** Ex neglectu tenentur reges ac magistratus, qui ad inhibenda latrocinia et piraticam non adhibent ea quæ possunt ac debent remedia: quo nomine damnati olim ab Amphictyonibus Scyrii. Quæsitum memini ex facto, cum patris nostræ rectores potestatem prædarum in mari ex hoste agendarum per codicillos plurimis dedissent, et eorum nonnulli res

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an involuntary act arising from a voluntary one is held morally for a voluntary one.

**XIX.** As, by the consent of nations, a rule has been introduced, that all wars, conducted on both sides by authority of the sovereign power, are to be held just wars; so this also has been established, that the fear of such a war is held a justly imposed fear, so that what is obtained by such means cannot be demanded back. And here the distinction appears between an enemy and pirates or robbers\*. For what these take, may be demanded back, except an oath have been introduced to prevent it; what those take, not so. Wherefore, what appears to Polybius to be a just cause for the Carthaginians beginning the second Punic war, that the Romans had before made war upon them when they were engaged with the mutiny of their mercenaries, and had wrung from them the island of Sardinia, and a money payment, has some shew of natural equity, but is at variance with the Law of Nations, as we shall elsewhere explain.

**XX. 1** Kings and magistrates are liable for neglect, who do not apply the remedies which they can and ought, to restrain robbery and piracy: on which ground the Scyrians were in ancient times condemned by the Amphictyons. I recollect the question being proposed to me,—from the fact when the rulers of our country had given

\* And so the connexion between "private war" and public war disappears. W.

amicorum rapuissent, desertaque patria mari vagarentur, ac ne revocati quidem redirent, an rectores eo nomine tenerentur, aut quod malorum hominum usi essent opera, aut quod cautionem non exegissent. Dux eos in nihil amplius teneri, quam ut noxios, si reperiri possent, punirent aut dederent: præterea in bona raptorum jus reddi curarent. Nam ipsos injustæ prædationis causam non fuisse, nec quicquam de ea participasse; prohibuisse etiam legibus ne amicis noceretur: cautionem ut exigerent nullo jure fuisse obligatos, cum possent, etiam sine codicillis, omnibus subditis hostem spoliandi potestatem facere, quod et factum olim esset: neque talem permissionem causam esse cur damnum datum esset sociis, cum possent privati etiam sine permissu tali naves armare et in mare progredi. Mali vero an futuri illi essent provideri non potuisse; neque vero vitari posse quo minus et malorum opera utamur, alioqui nullum colligi posse exercitum.

2 Neque vero si quid milites, aut terrestres, aut nautici contra imperium amicis nocuissent, reges teneri: quod <sup>1</sup>Gallia et Angliae testimoniis probatum. Ut vero sine culpa sua ex ministrorum facto quisquam teneatur, non esse juris gentium,

<sup>1</sup> Gallia] Vide etiam tomo constitutionum III. tit. 2. constitutione anni c<sup>lo</sup> I<sup>o</sup> Tom. III. ann. 1583. c. 44.

*Const. Gall.*  
tit. 3. const.  
c. 44.

several persons letters of privateering and authority to make captures, and some of these persons had captured the property of friends, and, leaving their country, led a life of sea-rovers, not returning even when summoned home;—Whether the rulers were bound to restitution; either as having used the agency of bad men, or as not having demanded caution-money. I gave my opinion, that they were bound to nothing more than to punish and surrender the guilty persons, if they could be found; and, besides, to make the goods of the plunderers liable: for that they had not been the cause of the unlawful spoliation, nor had in any way shared in it; and had forbidden by law the plunder of friends: that there was no law obliging them to demand caution-money, since they might, if they chose, give all their subjects the right of capturing enemy's goods, which in former times had been done: and that such permission was not the cause why friends had been damaged, since private persons, even without such permission, could arm vessels and go to sea. And that whether those who went would turn out good or bad men, could not be foreseen; nor was it avoidable to use the agency of bad men as well as good, since otherwise no army could be got together.

2 Nor, if either soldiers or sailors, contrary to command, do any damage to friends, are the kings liable; which has been proved by the

ex quo dijudicanda esset hæc controversia, sed juris civilis, nec generalis, sed adversus nautas et alias quosdam ex rationibus peculiaribus introductum. Atque in eam partem a supremi auditorii judicibus contra Pomeranos quosdam pronuntiatum est, idque ad exemplum rerum in causa non dispari, ante duo sæcula, judicatarum.

XXI. Illud quoque notandum est, ut mancipium aut animal quod damnum, aut pauperiem fecit, noxæ dedatur, itidem ex jure civili esse.<sup>3</sup> Nam dominus, qui in culpa non est, natura ad nihil tenetur: ut nec is, cuius navis sine ipsius culpa navi alterius damnum dedit: quamquam multorum populorum legibus, ut et nostra, damnum tale dividi solet ob culpsæ probandæ difficultatem.

XXII. Sed damnum, ut diximus, etiam adversus honorem et famam datur, puta verberibus, contumeliis, maledictis, calumniis, irrisu, aliisque similibus modis. In quibus non minus quam in furto atque aliis criminibus viciositas actus ab effectu discernenda est. Nam illi poena respondet, huic damni repa-

Laws. II. 11.  
dub. 19, 25, 27.  
Soto. IV. q. 6.  
art. 3.

<sup>3</sup> Hoc verum quidem est de Animali bruto, quod, utpote ratione destitutum, damnum proprie dictum dare nequit. At alia est ratio de Mancipio; ut ostendimus in Gallicis nostris Notis ad hunc locum. J. B.

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testimony both of France and England: that any one, without any fault of his own, is bound by the acts of his agents, is not a part of the Law of Nations; by which this controversy must be decided, but a part of the Civil Law; nor of that in general, but introduced against sailors, and certain others, for peculiar reasons. And sentence was given to that effect by the Judges of the Supreme Court, against certain Pomeranians; and that, according to the precedent of a similar cause, adjudged two centuries ago.

XXI. It is to be noted also that the rule, that if a slave, or any animal, cause any damage or loss, it creates a liability in the master, is also a creation of Civil Law. For the master, who is not in fault, is not liable by Natural Law; as also he is not whose ship, without any fault of his, damages another's ship: although by the laws of many nations, and by ours, the damage in such case is commonly divided, on account of the difficulty of proving where the fault lay.

XXII. Damages also, as we have said, may be inflicted on a man's honour or reputation; as with blows, insults, abusive language, calumny, ridicule, and the like. In which cases, no less than in theft, and other offenses, the badness or malice of the act must be distinguished from the damage. For the badness of the act is a ground for punishment, the loss, for reparation: which, in this case, is made

ratio, quæ fit culpæ confessione, <sup>1</sup>exhibitione honoris, testimonio innocentia, et per ea quæ his similia sunt: quanquam et pecunia tale damnum rependi poterit, si læsus velit, quia pecunia communis est rerum utilium mensura.

<sup>1</sup> *Exhibitione honoris, testimonio innocentia*] Vide exemplum Viviani, qui accusationis injustæ poenitentia ductus est, apud Cassiodorum iv. 41.

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by confession of the fault, manifestation of respect, testimony of the innocence of the calumniated person, and the like: though such damage may also be compensated by money, if the injured person choose; because money is the common measure of valuable things.



## CAPUT XVIII.

### DE LEGATIONUM JURE.

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|--|---|
| I. <i>Obligationes quasdam ex jure gentium nasci, ut jus legationum.</i>                     | <i>sus non est.</i>   |
| II. <i>Inter quos locum habeat.</i>  | <i>Hostem ad quem missus est legatus teneri:</i>                  |
| III. <i>An semper admittenda legatio.</i>  | <i>Nec opponi posse jus talionis.</i>                             |
| IV. <i>Adversus legatos periculosa molientes defensionem licetam, non exactionem paucos.</i> | <i>Jus hoc et ad comites legatorum porrigi: si legati volunt.</i> |
| V. <i>Legationis jure non tenori cum, ad quem legatus missus non est.</i>                    | <i>Et ad bona mobilia.</i>  |
|  | <i>Exempla obligationis, sine cogendi jure.</i>                   |
|  | <i>Quanti sit hoc jus legationis.</i>                             |

I. **H**ACTENUS ea memoravimus, quæ ex jure naturæ debentur nobis, paucis duntaxat additis de gentium jure voluntario, quatenus ab eo aliquid erat juri naturæ superad-

<sup>1</sup> *Jus Legationum, in se spectatum, vere oritur a Jure Naturali, ut ostendit PUFENDORFIUS, De Jure Nat. et Gent. Lib. II. cap. iii. § 23. Quæ autem privilegia moribus gentium tantum originem debent, illa nemo tenetur Legatis concedere, nisi velit, et pacto vel expresso, vel tacito, ad illa concedenda sese obstrinxerit. J. B.*

<sup>a</sup> *Sanctimoniam legatorum] Pomponius I. si quis. ult. D. de Legationibus: Si quis legatum hostium pulsasset, contra jus gentium id commissum esse existimat, quia sancti habentur legati: et ideo si cum legati apud nos essent gentis alijcujus, bellum cum eis indicium sit, liberos eos manere. Id enim juri gentium conveniens esse. Itaque cum, qui legatum pulsasset, Quintus Mucius dedit hostibus, quorum erant legati, solitus est respondere. Lega Julia de vi publica tenetur, quod ad legatos ora-*

*tores, comitesve attinebit, si quis eorum quem pulsasse sive injuriam fecisse arguetur, Ulpiano respondentे in l. lege Julia, 7. D. ad legem Julianam de vi publica. Josephus Antiquæ Historiæ libro xv. cap. 8. multum predictat legatorum sanctimoniam, quibus ait commune cum angelis Dei nuntiū nomen. Varro, Lib. III. de Lingua Latina: Sancta sunt corpora legatorum. Cicero, Verrina III. Legatorum jus divino humanoque vallatum præsidio, cuius tam sanctum et venerabile nomen esse debet, ut non modo inter sociorum jura, sed et hostium tela incolumente versetur. Scriptor vita Epaminiondæ: [Immo Pelopida. CORN. NEROS, c. v. n. 1.] Cum legationis jure se tectum arbitraretur, quod apud omnes gentes sanctum esse consuisset. Diodorus Siculus in excerptis Peiresianis, Pag. 349. τὴν δοέιαν vocat τῆς τῶν πρεσβυτῶν ἀσύλιας· securitatem a legatorum sanc-*

### CHAPTER XVIII. *Of the Right of Legation.*

I. Hitherto we have spoken of things which are due to us by Natural Law, adding only a few points which belong to the instituted Law of Nations, in so far as by that any thing was added to the Law of Nature. It remains to speak of the obligations which that which

ditum. Restat veniamus ad obligationes quas ipsum per se jus illud gentium, quod voluntarium dicimus, induxit: quo in genere <sup>1</sup>præcipuum est caput de jure legationum. Passim enim legimus sacra legationum, <sup>a</sup>sanctimoniam legatorum, jus gentium illis debitum, jus divinum humanumque: sanctum inter gentes jus legationum, federa sancta gentibus, fedus humanum: sancta corpora legatorum: Papinio (*Thebaid.* II. 486):

Sanctum populis per secula nomen.

Cicero de haruspicum responsis: *Sic enim sentio, jus legatorum cum hominum præsidio munitum, tum etiam divino jure esse vallatum.* Itaque hoc violare non injustum tantum esse, <sup>b</sup>sed et impium omnium confessione, ait Philippus in epistola ad Athenienses.

*Ap. Demosth.  
p. 62 A.*

*timonia.* Apud Papinium Lib. II. (Theb. vers. 373):

tutique regressus

Legato.

Chrysostomus: *καὶ οὐδὲ τὸν κοινὸν νόμον ἡδεσθησαν, ὅτι ὁ πρεσβεύων οὐδέποτε πάσχει τι κακὸν νε κοινεῖν.* *quidem fas hominum reveriti sunt, quod tutos prestat legatos ab omni malo.* Servius ad XI. *Aeneidos* (vers. 101): *ab omni injuria tectis jure gentium.* Ne omnia loca enotem, adde Livium Lib. I. *de Laurentibus*, (cap. 14) Diouem Chrysostomum *de Lege et Consuetudine*, Velleium Paterculum initio Lib. II. Menandrum Protectorem, (Exc. Legat. 19) Epistolam Felicia ad Zenonem in appendice codicis Theodosiani data a Sirmundo. Totilas apud Procopium *Gotthicorum* III. *πᾶσι μὲν, ὃς ἐτί πλεῖστον εἰπεῖν, νόμοι βαρβάροις, τὸ χρῆμα τῶν πρεσβέων στέψειν omnibus, ut generatim loquar, barbaris mos legatos venerari.* (Cap. 16.) Idem de barbaris dixit Scafnaburgensis. Aimonius regi Clodovæ haec dicta tribuit: *Ad extremum pro divinis simul humanisque legibus, quæ injuriarum immunes sanciunt,*

*debere esse eos qui mediatores hostilium efficiuntur armorum. Inter arma namque sola legatio pacis sequestra est. Exiit hostem qui legatione fungitur.* Vide et Radevicum in appendice. *De Polonis* vide Cromerum libro XX. *De Turcis* Leunclavium libro VIII. et libro XVII. *De Mauris Marianam* libro XII. c. 14. [Apud Varro non existant verba, quæ tamquam ex illo adfert Auctor, circa initium Notæ istius. Errorem hausit e nota Dionys. Gothofredi in L. 17 D. *De Legation.* ubi hic pro verbis Varrois laudat, quod Cujacius dicit Observ. XII. 5. post indicatum Varrois fragmentum e Lib. III. *De Vita populi Rom.* quod servavit NONIUS MARCELLUS, p. 529. *Edit. Mercer.* Apud Velleium Paterculum etiam, Lib. II. cap. 2. initio, nihil est quod huic faciat; et Authoripæ locum illum, juxta rerum sensum, supra adulit, cap. xv. § 16. num. 2. in fine. Locus Ciceronis non est ex Verrin. III. sed e Lib. I. in Verr. c. 33. et prima etiam ejus verba petita sunt ex *Orat.* *De Haruspic. Respons.* cap. 16. *J. B.*] <sup>b</sup> *Sed et impium]* *Ἐργον ἀσεβὲς*, ait Plutarchus in *Vita Æmilia*, narrans

we call the Instituted Law of Nations has of itself introduced: in which class, the principal head is the Right of Legation. For we everywhere read of the reverence for Embassies, the sacredness of Ambassadors; the Rights of Nations lodged in them by Divine and Human Law; all which belong to those Instituted Laws; with other

II. 1 Sed primum sciendum est, qualemque est hoc jus gentium de quo videbimus, ad eos legatos pertinere, quos mitunt qui summi imperii sunt compotes inter se; nam qui extra hos legati sunt provinciales, municipales, atque alii, non jure gentium, quod inter gentes est diversas, sed jure civili reguntur.  
Lib. I. 32. Legatus apud Livium publicum se nuntium populi Romanici vocat. Apud eundem Livium alibi senatus Romanus jus legationis externo, non civi comparatum ait: et Cicero ut ostendat non esse legatos mittendos ad Antonium: *Non enim, inquit, cum Annibale res est, hoste reipublicæ, sed cum cive.*  
Phil. v. 10.  
En. vii. 369. Qui autem externi habendi sint ita clare exposuit Virgilius, ut nemo jurisconsultorum possit clarius:

Omnem equidem sceptris terram qua libera nostris  
Dissidet, externam reor.

2 <sup>c</sup>Qui ergo impari junguntur federe, cum sui juris esse non desinant, jus habebunt legationis: immo et hi qui ex parte subditi sunt, ex parte non sunt, pro ea parte qua non sunt

Gentii factum, (p. 261.) Josephus libro xv. *Historia Antiquæ: τοῦτο τὸ δύομα καὶ πολεμίους πολεμίοις διαλέπτειν δύναται· ποιον οὖν μεῖζον ἀν γένοιτο δεῖθημα ή πρέσβεις ἀποκτεῖναι, τοὺς ἄτερ τοῦ δικαίου διαλεγομένους; Hoc nomen et hostes hostibus valet reconciliare; quid ergo fieri magis im-*

pium potest, quam legatos occidere pro aquitate loquentes? (Cap. v. § 3. pag. 753.)

<sup>c</sup> *Qui ergo impari junguntur federe]* Cromerus xxx.

<sup>d</sup> *Putta cum ita divisus est populus]* Vide de legatis civitatis Toleti ad regem Johannem, Marianam libro xxii. 8. de

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the like phrases. [See other phrases in the text. Papinius Statius; Cicero.] To violate this is not only unjust, but impious, by the confession of all; as Philip says.

II. 1 But, in the first place, this Law of Nations, whatever it be, applies to those Ambassadors only who are sent by Sovereign Powers to one another. For those who are sent as representatives of provinces, towns and others, are not governed by the Law of Nations, that is, by International Law, but by the Civil Law. An Ambassador, in Livy, calls himself the Public Messenger of the Roman People. And again, the Senate says that the Right of Legation belongs to a foreigner, not to a citizen. And Cicero, arguing that ambassadors should not be sent to Antony, says, *For we have not to deal with Annibal, an enemy of the State, but with a citizen of the State.* Virgil explains clearly who are strangers (*En. vii. 369*).

2 Those states which are joined by an unequal league, when they do not cease to be their own masters, will have the Right of Legation: and also those who are only partly subject, for the part in which they are not subject. But kings who have been conquered in a formal

subditi. At reges qui bello solenni victi, regnoque exuti sunt, cum aliis regni bonis et jus legandi perdiderunt. Ideo Persei a se victi caduceatores retinuit P. Aemilius.

3 In bellis vero civilibus necessitas interdum locum huic juri facit, extra regulam, <sup>4</sup> puta cum ita divisus est populus in partes quasi aequales, ut dubium sit ab utra parte stet jus imperii; aut cum jure admodum controverso de regni successione duo decertant. Nam hoc eventu gens una pro tempore quasi duæ gentes habetur. Ita <sup>Hist. III. 80.</sup> <sup>5</sup> Flavianos accusat Tacitus, quod sacram etiam inter exteras gentes legatorum jus in Vitellianis civili rabie temerassent. Piratae et latrones, qui civitatem non faciunt, jure gentium niti non possunt. Tiberius cum ad eum Tacfarinas legatos misisset, indoluit, quod desertor et prædo hostium more ageret: quæ verba sunt Taciti. Sed interdum <sup>Ann. III. 73.</sup> tales qui sunt, jus legationis nanciscuntur fide data, ut olim fugitivi in saltu Pyrenæo.

III. 1 Duo autem sunt de legatis quæ ad jus gentium referri passim videmus, prius <sup>6</sup> ut admittantur, deinde ne vio-

*Cesar. de Bell. Civ. III. 19.*

*Flandris Crantium Saxonice XII. 33.*

<sup>6</sup> *Flavianos accusat Tacitus*] Et Magnentium Zosimus libro II. Magnéntios δὲ καθ' ἑαυτὸν ἐστρεψε γνώμην, πότερον χρῆ Φίλιππον ἀπράκτον ἀποπέμψειν, ή κατέχειν ταρ' ἑαυτῷ ἐπὶ τοῖς πρέσβεσι πατοῦντι θεσμόν. Magnentius apud animum suum

volrebat, deberetne Philippum irritum dimittere, an apud se retinere calcato jure legationum. Is Philippus a Constantio venerat. (Cap. 47. *Ed. Cellar.*)  
<sup>7</sup> *Ut admittantur*] Donatus ad prologum Иесуя: *Oratorem audire opportere jus gentium est.* (Ad vers. 1.)

war, and deprived of their kingdom, along with their other possessions, lose the right of legation. So P. Aemilius retained the negotiators who came from Perseus, whom he had conquered.

3 But in civil wars, necessity sometimes makes room for this right, *extra regulam*: for instance, when the people is divided into nearly equal parties, so that it is doubtful with which party the right of the supreme authority is: or when two claimants for the succession contend with very balanced pretensions. For in such an event, one nation is, for the time, two nations. Thus Tacitus accuses the Flavians that the right of Legation, which is sacred even between strangers, they had savagely violated in the case of the Vitellians. Pirates and robbers, who do not make a State, cannot claim the right of legation. Tiberius, when Tacfarinas sent ambassadors to him, was disturbed that a deserter and a robber gave himself the air of an open enemy, as Tacitus says. But sometimes such persons obtain a right of legation by promise given them on good faith, as was the case with a band of fugitives in the Pyrenees.

III. 1 There are two points with regard to ambassadors which

**Lib. xxi. 10.** Ientur. De priore locus est Livii, ubi Hanno senator Carthaginensis in Annibalem sic invehitur: *Legatos ab sociis, et pro sociis venientes bonus Imperator vester in castra non admisit: jus gentium sustulit.* Quod tamen non ita crude intelligendum est: *non enim omnes admitti præcipit gentium jus: sed vetat sine causa rejici.* Causa esse potest ex eo qui mittit, ex eo qui mittitur, ex eo ob quod mittitur.

**Thuc. ii. 12.** **2** Melesippus Lacedæmoniorum legatus, auctore Pericle, dimissus est extra fines agri Attici, quod ab hoste armato veniret. Sic <sup>b</sup>senatus Romanus negavit se Carthaginensium legationem admittere posse, quorum exercitus esset in Italia.

**Zonar. Tom. ii. (ix. 13.)** **Liv. xlii. 29.** Persei adversus Romanos bellum molientis legatos non admisserunt Achæi. Sic Totilæ sœpe perfidi legationem rejecit Justinianus, et Gothi, qui Urbini erant, Belisarii oratores. Cythennensium quoque, ut gentis sceleratæ, legatos undique pulsos

**Procop. iii. 37. et vi. 19.** **a** *Non omnes admitti præcipit gentium jus]* Vide Camdenum in anno clo Io LXXI. questionum ibi propositum quarta.

**b** *Senatus Romanus negavit se Carthaginensium legationem admittere posse, quorum exercitus esset in Italia]* De hoc Romanorum more vide Servium ad vii. *Aeneidos*, (vers. 168.)

**1** *Ubi causa mittendi aut suspecta est]* Sic Andreas Burgus Cæsaris legatus in Hispaniam non admissus: Mariana libro xxix. (cap. 15.) Simile apud Cromerum libro xx.

**c** *Intra decem dies Italia excedenter]* Carolus Quintus Imperator legatos Gallie, Venetorum, et Florentinorum ad bellum sibi indicendum missos deduci

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we everywhere find referred to the Law of Nations: that they be admitted, and that they be not violated.

Of the first point; Hanno inveighs against Annibal, that, not admitting the ambassadors of the allies, he had violated the Law of Nations. Which however is not to be understood so absolutely; for the Law of Nations does not prescribe that all ambassadors are to be admitted; but that they are not to be excluded without cause.

The cause may be on the part of him who sends, of him who is sent, or in the fact that he is sent.

[Examples of the first case.]

2 Melesippus, the ambassador of the Lacedæmonians, was dismissed beyond the borders of the Attic territory, by the advice of Pericles, because he came from an armed enemy [within the territory]. So the Roman Senate declared that no embassy of the Carthaginians could be received while their army was in Italy. The Achæans did not admit the ambassadors of Persicus, when he was organizing a war against the Romans. So Justinian rejected the embassy of Totila, who had often broken his faith; and the Goths at Urbino sent back the ambassadors of Belisarius. So Polybius relates that the ambassadors of the

narrat Polybius. Secundi exemplum est in Theodoro, qui Lib. iv. 21.  $\ddot{\alpha}\theta\epsilon\sigma$  vocabatur, quem a Ptolemæo ad se missum audire Ly- Diag. Laer. II. 102. simachus noluit: idemque aliis evenit peculiaris odii causa. Tertium quod diximus locum habet, ubi causa mittendi aut suspecta est, ut Rhabsacis Assyrii legatio ad populum conci- 2 Reg. xviii. 36. tandem merito suspecta erat Ezechiæ, aut non ex dignitate aut temporibus conveniens. Sic Ætolis denuntiarunt Romani, ne Liv. xxxviii. 49. quam legationem mitterent, nisi permissu Imperatoris: Perseo ne Romanam mitteret, sed ad Licinium: et Jugurthæ legatis L lib. xxxii. 26. Sallust. Bell. Jug. c. 31. edictum <sup>k</sup>intra decem dies Italia excederent, ni regnum et regem deditum venissent. Optimo autem jure rejici possunt, quæ nunc in usu sunt legationes assidue, quibus quam non sit opus docet mos antiquus, cui illæ ignoratæ.

IV. 1 <sup>1</sup>De non violandis legatis difficilior est quæstio, et varie a claris hujus sæculi ingeniis tractata. Videndum autem

jussit in locum, qui a comitatu suo ab-  
asset triginta milliaria. Guicciardinus  
libro XVIII. (pag. 472. Ed. Genev.  
1645.) Bellaius libro III. (fol. 103.  
*Edit. Paris. 1573.*)

*θεσμὸν, εἰχεν ἐν δεσμοῖς. Ille Avarorum legatos contra jus legationum in vinculis habuit. Vide Ern. Cothmannum responso xxxii. num 29. et sequentibus, volumine v. [Non Justinus II. Legatos Avarum, sed Baianus, horum Rex, Justinus legatos in vincula conjectat: Excerpt. Legat. Cap. 9. J. B.]*

Cynethenses, as being those of a wicked race, were every where expelled.

Of the second case, we have an example in Theodorus, who was called the Atheist, and whom Lysimachus would not hear, when he was sent by Ptolemy; and the same happened to others on account of some peculiar odium.

The third case occurs when the cause of the mission is either suspected, as when Rabshakeh was sent to Hezekiah: or is not conformable to the dignity of the receiver, or to the time. So the Romans forbade the Etolians to send any embassy, except by permission of the Emperor; commanded Perseus to send, not to Rome, but to Licinius; and ordered the ambassadors of Jugurtha to quit Italy within ten days, except they came to surrender the king and the kingdom. The embassies which may be with the best right excluded, are those resident embassies which are now common, but which are not necessary; as we learn from ancient custom, to which they were unknown.

IV. 1 The question of the inviolability of ambassadors is more difficult, and variously treated by the able men of our time. We must first consider the persons of the ambassadors, and then their suite and property.

habemus de legatorum personis, deinde de comitibus eorum ac bonis. De personis alii ita sentiunt, jure gentium vim dunt taxat injustam a legatorum corporibus arceri: censem enim privilegia ex jure communi interpretanda. Alii non omnibus de causis putant legato vim inferri posse, sed ita demum si jus gentium ab eo laesum sit, quod satis late patet: nam in jure gentium jus naturae includitur, ita ut ex omnibus delictis puniri jam legatus possit, nisi quæ ex mero jure civili oriuntur. Restrингunt hoc alii ad ea, quæ contra statum reipublicæ, aut dignitatem ejus, ad quem legatus mittitur, fiunt: quod ipsum sunt qui periculosem putant, et querelas exponendas ei qui misit, ejusque arbitrio permittendum legatum. Sunt et qui putant consulendos reges aut gentes quarum nihil interest: quod prudentiæ esse potest, juris non potest.

2 Rationes quas pro se quisque afferunt nihil definite concludunt: quia jus hoc non ut jus naturale ex certis rationibus certo oritur, sed ex voluntate gentium modum accipit. Potuerunt autem gentes, aut omnino cavere legatis, aut cum certis

<sup>8</sup> Immo ex isto loco contrarium inferri potest; ut ostendimus in Notis nostris Gallicis; ubi et quæ ad jus istud Legationis pertinent, accuratis extonuntur, ex principiis, non fictiti illius

Gentium Juris voluntarii, sed ipsius Juris Naturalis. Ceterum longe fuisus totum argumentum, etiam in eo quod ad merum usum Gentium refertur, a nobis postea excussum est in Notis Gallicis

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With regard to the persons of ambassadors, some are of opinion that they are protected only from unjust violence: for that their privileges are to be interpreted by common Law. Others think that force may be put upon an ambassador, not for any cause, but only if he violate the Law of Nations; which is a very wide expression; for in the Law of Nations, Natural Law is included: and so, according to this, an ambassador might be punished for any offense, except those which arise from mere Civil Law. Others restrict this to what is done against the state or dignity of the commonwealth to which the ambassador is sent: and others think that even this is dangerous, and that complaints against the ambassador are to be transmitted to him who sent him, and that he is to be left to be judged by him. Some, again, think that kings and nations who are not interested in the question, should be consulted; which may be a matter of prudence, but cannot be a matter of right.

2 The reasons which each of these parties adduce do not conclude anything definitely; because this Law of Nations is not like Natural Law, which flows in a sure way from certain reasons; but this takes its measure from the will of nations. For nations might either altogether refuse to entertain ambassadors, or with certain exceptions.

exceptionibus: nam et hinc utilitas stat pœnæ in gravia delinquentes, et inde utilitas legationum, quarum mittendarum facilitas securitate quanta potest esse maxima optime promovetur. Spectandum ergo quo usque gentes consenserint: quod ex solis exemplis evinci non potest. Exstant enim satis multa in partem utramque. Recurrendum igitur tum ad sapientum judicia, tum ad conjecturas.

3 Judicia duo habeo maxime illustria, Livii alterum, alterum Sallustii. Livii hoc est de legatis Tarquinii, qui proditionem concitaverant Romæ: *Quanquam visi sunt commisisse, ut hostium loco essent, jus tamen gentium valuit.* Videmus hic <sup>Lib. ii. 4.</sup> <sup>3</sup>etiam ad eos qui hostilia patrant jus gentium extendi. Sallustii dictum ad comites legationis, de quibus mox dicemus, non ad legatos ipsos pertinet: sed recte a majori, id est, minus credibili, ad minus, id est, magis credibile, procedet argumentatio. Is ita ait: *Fit reus magis ex æquo bonoque, quam ex jure gentium,* <sup>Bell. Jug. c.</sup> <sup>3</sup>*Bomilcar comes ejus, qui Romanam fide publica venerat.* Bonum et æquum, id est, merum naturæ

ad Versionem Libri Ampl. BYNKE-R-SHOECKII *De Foro Legatorum*, cuius secunda Editio prodiit Anno 1730. *J. B.*

<sup>3</sup> Locus iste male quoque hoc trahi-

tur, ut patet vel ex Interpretibus, qui verum ejus sensum dudum exposuerunt.  
*J. B.*

For on the one side stands the utility of punishment against grave delinquents, [even if they be ambassadors,] and on the other, the utility of ambassadors, the sending of whom is facilitated by their having all possible security. We must consider, therefore, how far nations have agreed; and this cannot be proved by examples alone. For there are many each way. We must recur therefore to the judgments of good authorities and to conjectures, that is, probable arguments.

3 There are two judgments of great note, that of Livy, and that of Sallust. Livy's is about Tarquin's ambassadors, who stirred up a treasonable design at Rome: *Though they had behaved so that they might have been treated as enemies, the Law of Nations prevailed:* here we see that the Law of Nations is extended even to those who act as enemies. The dictum of Sallust pertains to the subordinate members of the legation, of whom we shall have hereafter to speak, not to the ambassador: but the argument proceeds rightly, from the greater, that is, the less credible, to the less, that is, the more credible. He says thus: *Bomilcar, his companion, who had come to Rome on the public faith, is put under accusation, rather on the ground of equity, than of the Law of Nations.* Equity, that is, mere Natural Law, allows pen-

ius patitur poenas exigunt, ubi reperitur qui deliquerit: at ius gentium legatos et qui his similes fide publica veniunt excipit. Quare ut rei fiant legati contra ius est gentium, quo vetari multa solent quae ius naturae permittit.

4 Conjectura quoque hinc stat. Verius enim est privilegia ita intelligenda, ut aliquid tribuant ultra ius commune. Quod si legati ab injusta tantum vi tuti essent, nihil in eo magni esset, <sup>4</sup>nihil praecepui. Adde quod securitas legatorum utilitati, quae ex poena est, preponderat. Nam poena haberi potest per eum qui legatum misit volentem: et si nolit, ab ipso exigi bello, tanquam criminis approbatore. Objiciunt aliqui satius unum plecti, quam bello multos involvi; atqui si is qui legatum misit factum ejus probet, legati poena bello nos non eximet. Parte vero altera valde in lubrico locatur salus legatorum, si actuum suorum rationem alii reddere debeat, quam a quo mittantur. Nam cum plerumque diversa, saepe et adversa sint consilia eorum qui mittunt legatos, et qui accipiunt, vix est ut non semper aliquid in legatum dici possit, quod

<sup>4</sup> Abunde sufficit, si non ob quaevis delicta jure suo excidat Legatus. *J.B.*

<sup>m</sup> Aut e finibus iubendus excedere legatus] Fecit id Stephanus Polonus rex Moscic. Thuanus, libro LXXXIII. in anno c<sup>o</sup> 10 LXXXI. Elisabetha Scoto,

et Hispano. Utrumque habes apud Camdenum in an. clo 10 LXXI. et clo 10 LXXXIV. [Quod Auctor heic in contextu, quasi ex Polybico, refert, nullibi apud hunc Auctorem reperio. Et videatur omnino deceptus ab Alberico Gentil.

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alties to be demanded when the delinquent can be got hold of; but the Law of Nations makes an exception in favour of ambassadors and those who come under the public faith. Hence to put ambassadors under accusation is contrary to the Law of Nations, which forbids many things which Natural Law permits.

4 Conjecture also is on this side. For it is the sounder opinion that privileges are so to be understood, that they give something beyond common rights. But if ambassadors were only protected from unjust violence, there would be in that nothing great, nothing distinguished. Add that the security of the ambassadors may preponderate over the utility which involves a penalty. For punishment may be had through his means who sent the ambassador; and if he will not afford it, may be demanded by war of him as the approver of the crime. Others object that it is better that one should be punished than many involved in war: but if he who sent the ambassador approve of what he did, his punishment will not save us from war.

On the other side, the safety of ambassadors is in a very insecure position, if they have to render account of their acts to other persons than him who sent them. For since the views of those

criminis accipiat speciem. Et quanquam quædam sunt ita manifesta, ut dubitationem non habeant, sufficit tamen ad æquitatem et utilitatem legis universalis periculum universale.

5 Quare omnino ita censeo, placuisse gentibus ut communis mos, qui quemvis in alieno territorio existentem ejus loci territorio subjicit, exceptionem pateretur in legatis, ut qui sicut fictione quadam habentur pro personis mittentium (*senatus faciem secum attulerat, auctoritatem reipublicæ*, ait de legato quodam M. Tullius) ita etiam fictione simili constituerentur quasi extra territorium; unde et civili jure populi apud quem vivunt non tenentur. Quare si tale sit delictum quod contemni posse videatur, aut dissimulandum erit, <sup>¶</sup><sup>m</sup>aut e finibus jubendus excedere legatus, quod Polybius ei factum narrat qui Romæ obsidibus fugiendi causam præbuerat. Unde obiter datur intelligi, quod alio tempore legatus Tarentinorum, qui idem deliquerat, virgis cœsus est, id eo evenisse, <sup>n</sup>quod Tarentini victi sub Romanis esse cœpissent. Si crimen sit atrocius, et ad publicum malum spectans, <sup>o</sup>remittendus erit legatus

*De Legat. II. 21.* qui ait: *ut in Selectis*

*peravit ne a comitatu suo abcederet.*

*habet Polybius.* Ibi autem certe nihil

*Guicciardinus (libro XVIII. pag. 472)*

*tale. J. B.]*

*indicato jam loco.*

<sup>a</sup> *Quod Tarentini victi sub Romanis*

*Mittendus erit legatus ad eum qui*

*esse cœpissent]* Sic Carolus V. legato

*misit]* Dion in excerptis legationum:

*ducis Mediolanensis, ut subditi sui, im-*

*πρέσ-*

who send the ambassador and those who receive him are generally diverse, often contrary, it is scarcely possible that something may not be said against the ambassador which may take the form of an accusation. And though some things of this kind are so manifest that they admit of no doubt, the universal danger suffices to establish the equity and utility of the universal rule.

5 Wherefore I quite think thus: that the common rule, that he who is in a foreign territory is subject to that territory, does, by the common consent of nations, suffer an exception in the case of ambassadors; as being, by a certain fiction, in the place of those who send them: [see Cicero :] and by a similar fiction they are, as it were, *extra territorium*; and thus, are not bound by the Civil Law of the People among whom they live. Hence, if there be any delict which can be treated lightly, either it is to be overlooked, or the ambassador ordered beyond the borders, as Polybius relates was done to him who at Rome had aided the escape of the hostages. On which occasion, in passing, we are given to understand that at another time, the ambassador of the Tarentines, who had committed the same offense, was scourged; but that was done, because the Tarentines had begun

Liv. v. 36.

ad eum qui misit, cum postulato ut eum puniat aut dedat, quomodo Gallos postulasse legimus, ut sibi dederentur Fabii.

6 Sed, quod supra diximus aliquoties, humana jura omnia ita esse comparata, ut non obligent in summa necessitate, id de hoc quoque praecepto sanctimoniae legatorum obtinebit. Verum is apex necessitatis non est in sumtione poenæ, quam et aliis in casibus tolli jure gentium infra apparebit, cum de solennis belli effectibus agemus: multo minus in loco, tempore, ac modo sumendæ poenæ, sed in præcautione gravis mali, præsertim publici. Quare ut obviam eatur imminenti periculo, si alia nulla est ratio idonea, et retineri et interrogari legati poterunt. Ita consules Romani Tarquinii plegatos deprehenderunt, literarum in primis habita cura, ut Livius loquitur, ne intercidarent.

*βεις εἰς τὴν Πάμην ἀλθόντες, ὑβρίσαντες, ἐπέμφθησαν μὲν εἰς τὴν Καρχηδόνα, καὶ ἔξεδόθησαν σφίσιν, οὐν ἔπαθον δὲ ὅτι' αὐτῶν δεινὸν οὐδὲν, δλλ' ἀφείθησαν. Cum juvenes quidam legati a Carthaginē Romanā venissent, ibique contumeliose quædam fecissent, missi sunt Carthaginem, traditique Carthaginensibus, ab his vero nihil illis nocutum est, sed dimissi sunt incolumes.* [Exc. Fulv. Ursin. num. 18. ubi ex incogitania Auctori noster postrema verba male vertit, pro: *Traditique illis, scilicet, Romanis, non Carthaginensisibus, a quibus contra legati dediti sunt.* J. B.]

P Legatos deprehenderunt] Pelopidas in vincula conjectus ab Alexandro Pheræo, quod, legatus cum esset, These-

salos ad libertatem concitaret. Plutarchus, (pag. 292) et Latinus scriptor vitæ Pelopidae. (Corn. Nep. c. 5.)

<sup>4</sup> Literarum in primis habita cara] Vide Serranum in Henrico IV. [Aut potius Auctorem Supplementi Moniliardum, pag. 844. Edit. Francof. 1627. qua usus videtur Auctor. Neque enim Serranus ultra regnum Caroli VII. processit. Ceterum agitur ibi de eo, qui a Secretis erat Legato Hispanie, propter prodictionem, simul cum Maerargo, in custodiā dato. J. B.]

<sup>5</sup> Chorus est, qui loquitur heic, non Facialis, vers. 272. Quamquam et in Excerptis ex Trag. et Comic. Graecis, Auctor, nescio quare, id Faciali tribuat. J. B.

to be subject to the Romans. If the crime be more atrocious, and tending to public mischief, the ambassador must be sent back to him who sent him, with a demand that he be punished or surrendered; as the Gauls asked that the Fabii should be given up to them.

6 But, as we have said above, that all human rights are so conditioned, that they do not bind in cases of extreme necessity, so is this true in this doctrine of the inviolability of ambassadors. But that extreme of necessity does not occur in the requirement of punishment; which may also be suspended in other cases by the Law of Nations; as will appear below, where we treat of the established effects of war: still less does this necessity operate in the place, time, and manner of taking punishment; but it does hold in precautions against graver

7 Quod si vim armatam intentet legatus, sane occidi poterit, non per modum poenae, sed per modum naturalis defensionis. Sic Fabios, quos violatores juris humani Livius vocat, Lib. v. 33. Galli occidere potuerunt. Itaque apud Euripidem Heraclidis Demophon fecialem ab Eurystheo missum et vi supplices abripere conantem vi prohibuit, et cum ille <sup>5</sup>diceret :

Tun' fecialem cædere huc missum audeas?

Respondet,

Ni facialis dexteram a vi temperet.

Huic faciali nomen fuisse <sup>1</sup>Copreo, <sup>2</sup>et quia vi ageret a populo Athenensi interfectum, narrat Philostratus vita Herodis. Dis- vit. 5. sopk.  
tinctione non dissimili solvit Cicero quæsitum illud, an patrem Offic. iii. 23. patriæ proditorem filius accusare debeat. Vult enim debere ad

<sup>1</sup> Copreo] Vide *Iliados* O. (vers. 639.)

<sup>2</sup> Et quia vi ageret] Sic interpretandum, quod Theodahatus Gothus Justiniani legatis dicit apud Procopium *Gothicorum* 1. (cap. 7.) σεμὸν μὲν τὸ χρῆμα τῶν πρέσβεων καὶ ἀλλως ἔντιμον καθέστηκεν εἰς πάντας ἀνθρώπους. τοῦτο δὲ τὸ γέρας εἰς τόδε οἱ πρέσβεις ἐν σφίσιν αὐτοῖς διασκέουσιν, θύσιον σφετέρᾳ ἐπιεικεῖ φυλάξουσι τὸ τῆς πρεσβείας ἀξιωμα. κτεῖναι γάρ ἄνδρα πρεσβευτὴν ἐνδίκως νενομίκασιν ἀνθρώποι, ὅταν ή εἰς βασιλέα ὑβρίσας φαίνεται, ή γυναικός ἀλλως ξυνοικύνησης εἰς εὐνὴν ἔλθω. Sanctum apud homines legatorum nomen, plenumque honoris. Sed hoc jus legati sibi tamdiu servant,

quandiu sua modestia legationis dignitatem tuentur. Ita enim existimant homines, fas esse vel interficere legatum, si is in principem ad quem mittitur sit injurious, aut alienum matrimonium violet. Legati vero, cum ostendissent longissime se abesse ab adulterii suspicione, quorum ne exitus quisid sine custode essent, addunt prudenter : Τοὺς λόγους δὲ ὅσους ἀν ἐκ τοῦ πέμψαντος δκηκόως εἶπη, οὐκ αὐτὸς τὴν ἐντεῦθεν αἴτιαν, ἢνγε οὐκ δύασι τύχωσιν δυτες, εἰκότως ἀν λάβοι. ἀλλ' ὁ μὲν καλεόντας φέροιτο δικαίως τὸ ἕγκλημα τοῦτο. τῷ δὲ πρεσβευτῇ τὸ τιμὴν ὑπονοργίαν ἐκτελέσαι περίσσητι μόνον. Si legatus ea dixerit quæ audiri a principe qui ipsum misit, ea si non sint commoda, prestare

evil, especially public. Wherefore in order to obviate imminent danger, if there be no other effectual course, ambassadors may both be detained and interrogated. Thus the consuls of Rome apprehended the ambassadors of Tarquin, looking first to the letters which they carried, as Livy says, that they might not escape them.

If the ambassador use armed force, he may undoubtedly be killed, not in the way of punishment, but in the way of natural defense. Thus the Fabii, whom Livy calls the violators of human law, might be killed by the Gauls. So in Euripides, Demophon threatens the Herald. The name of this Herald was Copreus, and because he used violence, he was put to death by the Athenians, as Philostratus relates. Cicero solves, by a not dissimilar distinction, the question, whether a son ought to accuse a father who is betraying his

avertendum periculum imminens, non autem vitato jam periculo in facti poenam.

V. 1 Ea vero quam dixi lex, de vi legatis non inferenda, intelligenda est eum obligare ad quem missa est legatio, atque ita demum si admisit, quasi scilicet ab eo tempore tacita pactio intercesserit. Ceterum denuntiari et potest et solet, ne mittantur legati; alioqui pro hostibus fore: ut *Ætolis* a Romanis est denuntiatum, et olim a Romanis *Veientibus* edictum nisi facesserent urbe, daturos quod Lars Tolumnius dedisset: et Romanis a Samnitibus, si quod adiissent in Samnium concilium, haud inviolatos abituros. Non pertinet ergo hæc lex ad eos per quorum fines, non accepta venia, transeunt legati: nam <sup>49.</sup> siquidem ad hostes eorum eunt, aut ab hostibus veniunt, aut <sup>50.</sup> alioqui hostilia moliuntur, interfici etiam poterunt, quod Ath-

Liv. xxxvii.  
Idem iv. 58.

Liv. x. 12.

Thuc. ii. 67.

*non ipse debet culpam, sed qui eum misit: ipsi quippe nihil aliud concessum est quam ministerio mandato fungi.* Vide et Camdenum indicato jam loco anni clo Io LXXI.

<sup>1</sup> *Siquidem ad hostes eorum eunt, aut ab hostibus veniunt]* Siculi Atheniensium socii legatos Syracusanorum missos ad civitates alias cepere; Thucydides, Lib. vii. (c. 32.) Sic et Argivi cepere legatos Athenis a factione paucorum missos et Argos perduxere. Idem Thucydides

libro viii. c. 86. Legatos *Ætolorum* ad Romanos intercepere et pretium eis extorsere Epirots: horum unus literis Romanorum liberatus. Polybius in excerptis legationum num. 27. De Gallorum ad Turcam legatis quos in Pado Hispani cepere et occiderunt, vide judicia Parutæ libro xi. Bizari libro xxi. de Flandris civitatum legatis ad Gallum captiis a Maximiliano, Crantium *Saxonorum* xii. 23. Laudatur Belisarius clementia, quod Gelimeris legatis in

country. For he decides that he may do so, to avert the imminent danger, but not to invoke punishment when the danger is past.

V. 1 But the law which I have stated, of the inviolability of ambassadors, is to be understood to bind him to whom the embassy is sent; and more particularly if he has received the ambassador, as if from that time a tacit compact had been introduced. But prohibitions may be and are often delivered, that ambassadors are not to be sent; and that if sent, they will be treated as enemies: as notice was given to the *Ætolians* by the Romans; and as it was in old times announced by the Romans to the *Veians*, that except they quitted the city, they would be treated as Lars Tolumnius had treated their ambassadors; [who put them to death:] and as was announced to the Romans by the *Samnites*, that if they presented themselves at any public meeting in Samnium, they would not depart inviolate. This law does not affect those through whose territory the ambassadors pass without having received permission: for in so far as they go to their enemies, or come from their enemies, or in any other way appear as enemies, they may be put to death. As the Athenians dealt with the

nientes fecerunt legatis inter Persas et Spartanos, Illyrii legatis inter Essios et Romanos: multoque magis vinciri, quod constituit Xenophon in quosdam, Alexander in eos, qui Thebis et Lacedæmon ad Darium missi erant, Romani in legatos <sup>App. de Bell. Ili. p. 780.</sup>  
<sup>Lib. vi. de Eryp. Cyri, c. 3. § 7.</sup>  
<sup>Ar. II. 15.</sup>  
<sup>Liv. xxii. 33.</sup>  
<sup>Dion. Halic. vi. 25.</sup>

<sup>\* Philippi ad Annibalem, et Latini in legatos Volscorum.</sup>

2 Tale si nihil sit, et male tractentur legati, <sup>\* non illud</sup> jus gentium, de quo agimus, sed amicitia et dignitas aut ejus qui misit, aut ejus ad quem eunt, violata censebitur. Justinus de Philippo posteriore Macedonum rege: *Legatum deinde ad Annibalem jungendæ societatis gratia cum epistolis mittit: qui comprehensus et ad senatum (Romanum) perductus incolumis dimissus est, non in honorem regis, sed ne, dubius adhuc, indubitatus hostis redderetur.*

#### VI. Ceterum admissa legatio <sup>y</sup>etiam apud hostes, tanto

Hispaniam missis et ab Hispania reveras Carthaginem, quæ jam facta erat Romanorum, pepercit. Procopius *Vandalicorum* i. [c. 24. Secundum exemplum, e Thucydide petitum, non accurate refertur. Legati enim per productionem traditi fuere Argivis a Parilia. *J. B.*]

<sup>\* Philippi ad Annibalem</sup>] Vide Apianum in excerptis legationum num. 19.

<sup>\* Non illud jus gentium de quo agimus</sup>] Aliud sit si quis extra fines suos

insidias ponat legatis alienis: eo enim jus gentium violaretur. Et hoc continetur in Thessalorum oratione contra Philippum, apud Livium, (xxxix. 25.)

<sup>y Etiam apud hostes</sup>] Vide loca modo producta ad § 1. Donatus ad illud Eunuchi: *CONVENIRE ET COLLOQUI. Sic pronunciatum est, ut quasi dicat, liceat per te, miles, quod etiam inter hostes et in bello licet.* (In Act. III. scen. 2, vers. 14.)

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ambassadors between the Persians and Thebans, and the Illyrians with those between the Essii\* and the Romans: and much more may they be thrown into bonds, as Xenophon did to certain persons, and Alexander to those who were sent from Thebes and Lacedæmon to Darius, and the Romans to the ambassadors of Philip to Annibal, and the Latins to those of the Volsci.

2 If there be no such cause, and ambassadors [passing through the territory] are ill treated, it is not the Law of Nations, of which we are speaking, which is violated, but the friendship and dignity either of him who sent them, or of him to whom they go, which is conceived to be violated. Justin says of the letter of Philip, king of Macedon, that his ambassador to Annibal being carried to Rome, he was dismissed in safety by the Senate, not out of honour to the king, but in order that he, as yet doubtful, might not be made an indubitable enemy.

VI. But the embassy, once admitted, has, even with enemies, and much more with a party merely unfriendly, the protection of the Law

\* The inhabitants of Issa, an island on the coast of Illyria. Gronov.

magis apud inimicos, præsidium habet juris gentium. Caduceatoribus in bello pacem esse dixit Diodorus Siculus. Lacedæmonii, qui Persarum feciales interfecerant, eo dicuntur συγχέαι τὰ πάντων ἀνθρώπων νόμιμα, confusisse omnium hominum jura. Si quis legatum hostium pulasset, contra jus gentium id commissum esse existimatur, quia sancti habentur legati, inquit Pomponius. Et Tacitus hoc jus de quo agimus vocat, *hostium jus et sacra legationis et fas gentium*. Cicero prima Verrina: *Nonne legati inter hostes incolumes esse debent?* Seneca de Ira: *Violavit legationes rupto gentium jure.* Livio cædes ruptura jus gentium, scelus, causa nefanda, cædes impia dicitur, in historia legatorum, quos Fidenates occiderant. Et alibi: *Legatis in periculum adductis ne belli quidem jura relicta erant.* Curtius: *Caduceatores qui ad pacem eos compellerent misit, quos Tyrii contra jus gentium occisos præcipitaverunt in altum.* Merito sane: nam et in bello plurima incident negotia, quæ nisi per legatos transigi non possunt, et ipsa pax vix est ut aliter coëat.

VII. Solet et illud quæri, an jure talionis interfici, aut male tractari legatus possit ab eo veniens qui tale quid patraverit. Et sunt quidem ultionis talis exempla in historiis satis

\* *Nihil tale quale factum esset a Carthaginiensibus]* Diodorus Siculus in excerptis Peirescianis: Σκιπίων οὐκ ἔφη δεῖν πράττειν δ τοῖς Καρχηδονίοις ἀγκαλοῦσιν. *Dixit Scipio, non esse id faciendum quod ipsi in Carthaginiensibus accusarent.* (Pag. 290.) et Romani ipsi legatos, jam comperto Carthaginiensium facto, dimiserunt. Vide Appianum. Constantius Titianum a

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of Nations. Heralds and negotiators are at peace in the middle of war, says Diodorus. The Lacedæmonians who put to death the ambassadors of the Persians, are said thereby to have thrown into confusion the rights of mankind. So Pomponius, Tacitus, Cicero, Seneca, Livy, Curtius. [See the passages.] And with great reason; for in war many things happen which cannot be transacted except by ambassadors; and peace itself can scarcely be attained in any other way.

VII. It is also made a question whether by the law of retaliation, an ambassador may be put to death or ill treated, who comes from a person who has perpetrated something of that kind. And certainly there are in histories many examples of such revenge. But histories relate not only what was rightly done, but what wrongly, angrily, passionately. The Law of Nations not only provides for the dignity of the Sender, but for the security of the Sent; and therefore there is a contract with the latter also. Wrong, therefore, is in such case done to him, though none be done to him who sent him.

LIB. V. 75.  
Herod. VII.  
137.

L. ult. D. de  
Legal.  
Ann. I. 42.  
Cap. 33.  
Lib. III. 2.  
Lib. IV. 17.  
Ibid. c. 32.  
Lib. xxiv. 33.  
Lib. IV. 2.

multa: sed nimurum historiæ non tantum quæ juste, sed et quæ inique, iracunde, impotenter facta sunt memorant. Jus gentium non tantum mittentis cavit dignitati, sed et ejus qui mittitur securitati; quare cum hoc quoque tacite contrahitur. Huic ergo fit injuria, etiam si ei qui misit nulla fiat. Non igitur magnanime tantum, sed et ex jure gentium Scipio, qui postquam legati Romanorum a Carthaginiensibus male essent habitu, ductis ad se Carthaginiensium legatis, et quid fieri debebet interrogatus respondit, <sup>App. de Bell. Pun. p. 19.</sup> "nihil tale quale factum esset a Carthaginiensibus. Addit Livius dixisse eum, nihil se factum institutis populi Romani indignum. Valerius Maximus consulibus Romanis in facto simili, sed antiquiore hanc tribuit vocem: *Isto te metu, Hanno, fides civitatis nostræ liberat.*" Nam tunc quoque Cornelio Asinæ, contra jus legationis, injectæ a Pœnis catenæ fuerant.

VIII. 1 Comites quoque et vasa legatorum sui generis sanctimoniam habent, unde in antiquo facialium carmine erat: <sup>Liv. i. 24.</sup> *Rex, facisne me tu regium nuntium populi Romani Quirium? vasa comitesque meos?* Et lege Julia de vi publica <sup>L. Leg. Jul. 7. Jul. de vi publ.</sup> teneri pronuntiantur non modo qui legatos, sed et qui comites eorum injuria affecerunt. Sed hæc <sup>\*sancta sunt accessorie, et proinde</sup> *sancta sunt accessorie*, et

Magnentio ad se missum remisit, quam <sup>xxi. et Parutam, de legatis Venetis in itinere in Galliam retentis, Lib. vii.</sup> Philippum a Constantio missum ad se retinebat Magnentius. Zosimus, libro ii. (cap. 49. *Ed. Cellar.*) Vide et historias apud Cromerum libris xix. et

*quatenus legato videtur] Vide Fraxini Canæi epistolas, paginis 75 et 279.*

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Therefore it was not only magnanimously done of Scipio, but also according to the Laws of Nations, when, after the ambassadors of the Romans had been illtreated by the Carthaginians, he had the Carthaginian ambassadors brought before him, and being asked, What was to be done with them, answered, Nothing like what the Carthaginians had done. Livy adds, that he said that he would do nothing unworthy of the institutions of Rome. Valerius Maximus, in a similar but more ancient fact, ascribes to the Consuls this saying, *From such fear, Hanno, the faith of our city liberates you:* for there also Cornelius Asina, contrary to the rights of legation, had been thrown into chains by the Carthaginians.

VIII. 1 The suite and the furniture of the ambassadors have also their own sacredness; and so the ancient formula of the Fecciales ran: *King, do you make me the royal messenger of the Roman People, with my company and equipments?* And by the Julian Law, those are held to be guilty of unlawful violence who have done injury, not only to

proinde quatenus legato videtur. Itaque si quid comites <sup>b</sup>Vi  
gravius deliquerint, postulari a legato poterit ut eos dedat.

Paus. Lib. vii.  
seu Act. c. 14.  
p. 586. enim abstrahendi non sunt: quod cum factum esset ab Achæis  
in Lacedæmonios quosdam, qui cum legatis Romanis erant,  
<sup>c</sup>vociferati sunt Romani jus gentium lædi: quo referri etiam  
potest Sallustii judicium de Bomilcare, quo supra usi sumus.  
Quod si dedere eos nolit legatus, eadem scilicet facienda erunt  
quæ modo de legato diximus.

2 Ipse autem legatus an jurisdictionem habeat in familiam  
suam, et <sup>c</sup>an jus asyli in domo sua pro quibusvis eo confugi-  
entibus, <sup>d</sup>ex concessione pendet ejus apud quem agit. Istud  
enim juris gentium non est.

IX. Bona quoque legati mobilia, et quæ proinde haben-  
tur personæ accessio, pignoris causa, aut ad solutionem debiti  
capi non posse, nec per judiciorum ordinem, nec, quod quidam  
volunt, manu regia, verius est; nam omnis coactio abesse a  
legato debet, tam quæ res ei necessarias quam quæ personam  
tangit, quo plena ei sit securitas. Si quid ergo debiti con-  
traxit, et, ut fit, res soli eo loco nullas possideat, ipse com-

<sup>b</sup> Vi enim abstrahendi non sunt] Serranus Henrico IV. [Aut potius Auctor Supplementi, eodem loco, quem indicavimus, in § 4. not. q. J. B.]

<sup>c</sup> Exemplum istud male refertur et

aptatur. Consule locum Pausanisæ,  
quem in ora libri distinctius indicavimus.  
J. B.

<sup>d</sup> An jus asyli in domo] Distingui  
ferme hac in re solent crimina. Vide

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ambassadors, but also to their companions. But these are sacred, in an accessory manner only, and so far as the ambassador chooses: and the ambassador may be required to give them up. But they are not to be taken by force. When this was done by the Achaeans to some Lacedemonians who were in the company of the Roman ambassadors, the Romans exclaimed loudly that the Law of Nations was violated. To this may be referred the judgment of Sallust concerning Bomilcar, which we have quoted above. But if the ambassador will not give them up, the course is to be taken which we have pointed out in speaking of the ambassador.

2 Whether the ambassador has jurisdiction over his own family and suite, and whether his house is to be an asylum for all who take refuge there, depends on the concession of the party with whom he resides: for it is not a part of the Law of Nations.

IX. Also the moveable property of an ambassador, which is regarded as an appendage to his person, cannot be taken or impounded for debt, neither by order of a court, nor (as some think) by the

pellandus erit amice, et si detrectet, is qui misit, ita ut ad postremum usurpentur ea, quæ adversus debitores extra territorium positos usurpari solent.

X. 1 Nec metuendum est quod quidam putant, ne si id juris sit nemo inveniatur qui cum legato contrahere velit. Nam et regibus qui cogi nequeunt non desunt creditores, et apud quosdam populos moris fuisse docet Nicolaus Damascenus, ut de contractibus qui in creditum iissent jus nullum redideretur, non magis scilicet quam adversus ingratos: ita ut congerentur homines, aut pariter implere contractum, aut contenti esse nuda fide debitoris. Et optat hunc rerum statum <sup>Erc. Petr. p. 592. e Stob. Scrm. 44.</sup> <sup>d</sup>Seneca: *Utinam quidem persuadere possemus, ut pecunias creditas tantum a volentibus acciperent: utinam nulla stipulatio emtorem venditori obligaret: nec pacta conventaque impressis signis custodirentur. Fides potius illa servaret, et æquum colens animus.* Persis quoque Appianus ait displicuisse: <sup>e</sup>*τὸν σιρῆνα περὶ τοῦ κιχρᾶσθαι ὡς ἀπατηλόν τε καὶ φιλοψευδὲς, pecuniam creditam sumere, ut quæ res fraudibus et mendaciis esset obnoxia.*

Parutam libro x. ubi rex Galliae hanc ob causam iratus pacatur. Vide eundem libro ix.

<sup>7</sup> Vide Celeberrimi THOMASII Dissertationem *De jure acyli, Legatorum ædibus competente*, quæ inter Lipsienses

xvi. numero est. *J. B.*

<sup>a</sup> *Seneca] De Beneficiis*, III. 15.

<sup>b</sup> *Τὸν κιχρᾶσθαι] Τὸ δέ φειλεῖν χρέος pro eodem dixit Herodotus Clio, (seu Lib. I. c. 138.)*

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royal hand. For all compulsion ought to be removed from an ambassador; that which touches things necessary to him, as well as his person, that he may have full security. Therefore, if he have contracted any debt, and, as may easily happen, has no real property in that country, he is to be asked for it in a friendly way; and if he refuse, he who sent him is to be applied to: and at last, he may be proceeded against in the manner of debtors who are without the territory.

X. 1 Nor is it to be feared, as some think, that on such terms no one will contract with an ambassador. For kings also, who cannot be compelled, do not fail to find creditors: and in some peoples it has been the custom, that he who had given credit on a contract should not have a sentence in his favour by a court: any more than if he brought an action for ingratitude; so that men would be compelled either to receive ready money, or to trust to the naked good faith of the debtor. Seneca expresses a wish for such a state of things. So Appian says this was the Persian practice.

*Var. Hist. iv.  
I. Lib. xv. p.  
708.* his verbis: Δίκην δὲ μὴ εἶναι πλὴν φόνου καὶ ὑβρεῶς. οὐκ  
έπ' αὐτοῦ γάρ τὸ μὴ παθεῖν ταῦτα. τὰ δὲ ἐν τοῖς συμβο-  
λαῖοις ἐπ' αὐτῷ ἐκάστῳ ὡς τε ἀνέχεσθαι δεῖ, ἔάν τις πα-  
ραβῆ τὴν πίστιν. ἀλλὰ καὶ προσέχειν ὅτῳ πιστευτέον, καὶ  
μὴ δικῶν πληροῦν τὴν πόλιν. *Judicia non esse nisi de cæde  
et injuria: quia homo præstare non possit ne in ea incidat:  
at contractus in cuiusque esse potestate: ideo ferendum si  
quis fidem violet: et ante videndum cui quisque credat, non  
autem litibus implendam civitatem.* A Charonda quoque  
*Stob. de Leg.  
Tit. 44.  
Ethic. Nic.  
viii. 1a.* constitutum fuit, ne quis actionem haberet qui de pretio habu-  
isset fidem: quod et <sup>1</sup>Platoni placuit. Notatum et Aristoteli:  
*παρ' ἐνίοις δὲ τούτων οὐκ εἰσὶ δίκαι, ἀλλ' οἴονται δεῖν στέρ-  
γειν κατὰ πίστιν συναλλάξαντας apud quosdam de his  
rebus judicia non sunt: existimant enim homines contentos  
esse debere fide quam sunt secuti.* Et alibi: *ἐνιαχοῦ τ' εἰσὶν  
νόμοι, τῶν ἐκουσίων συμβολαίων δίκαιος μὴ εἶναι, ως δέον φ  
ἐπιστευτεσ διαλυθῆναι πρὸς τοῦτον καθάπερ ἐκουνώησεν.*  
*Est ubi leges de <sup>2</sup>credito jus reddi vētant, quasi privatim  
tantum cum eo agendum sit, cum quo quis contraxit, et  
cuius fidem secutus est.* Quæ contra hanc sententiam adfe-  
runtur ex jure Romano, non ad nostros legatos, sed ad pro-  
vinciales aut municipales pertinent.

XI. Bellorum, quæ ob male habitos legatos suscepta  
sunt, plenæ sunt <sup>3</sup>profanæ historiæ. Exstat et <sup>4</sup>in sacris

<sup>1</sup> Platoni] VIII. de Legibus, (pag. 849, 850. Tom. II. Ed. H. Steph.)

<sup>2</sup> Vertendum erat, de contractibus voluntariis, ut Graeca sonant. Cetero-  
quin vide quæ diximus ad PUPENDOR-  
FIUM nostrum, De Jure Nat. et Gent.  
Lib. V. cap. ii. § 8. not. 1. J. B.

<sup>3</sup> Profanæ historiæ] Romani ob id  
bellum suscepere in Senonas. Appianus

excerpto legationum 4 et 10. In Illy-  
rios et Ligures. Polybius excerpto le-  
gationum 125 et 134. In Issios. Dion,  
exc. legationum 11. In Corinthios.  
Livius, libro LII. Epitom. In Tarenti-  
nos. Dionysius Halicarnassensis excerpto  
legationum 4. (p. 709, 710. Ed. Oxon.)  
Francorum et Germanorum exempla  
habes apud Aimoinum, libro III. cap. lxi.

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2 Elian relates the same thing of the Indians. Charondas made  
the like rule; and Plato approves. Aristotle remarks the same. [See.]  
The arguments against this from the Roman Law do not pertain to  
ambassadors such as we speak of, but to representatives of provinces  
and towns.

XI. Wars engaged in on account of ambassadors being ill used,  
are found in all parts of profane history. Also Scripture mentions

libris memoria belli quod eo nomine David gessit adversus <sup>2 Sam. x.</sup> Ammonitas. Nec aliam causam justiorem existimat Cicero <sup>Pro Lys.</sup> <sub>Man. c. 5.</sub> adversus Mithridatem.

et lxxxviii. et Withikindum libro II.      mun ad Stagirium libro III. (Tom. VI.  
b In sacris libris] Vide Chrysosto-      pag. 129.)

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the war which, on this account, David undertook against the Ammonites. Cicero says, there is no juster cause of war.

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## CAPUT XIX.

### DE JURE SEPULTURÆ.

- |  |   |
|--|---|
| I. <i>Ex eodem jure gentium nasci<br/>jus humandi mortuos.</i> | IV. <i>An et insigniter facinorosis?<br/>An et his, qui se interfecerint?</i> |
| II. <i>Unde ortum?</i>   | VI. <i>Quæ alia ex jure gentium de-<br/>beantur.</i>                          |
| III. <i>Deberi et hostibus.</i>                                |   |

I. 1 **E**X jure gentium, <sup>1</sup>quod ex voluntate ortum habet,  
debetur et corporum mortuorum sepultura. Dion

Hebri 100vs.  
Orat. 76. p.  
649 c.  
Chrysostomus inter mores, sive ἔθη, quæ τοῖς ἐγγράφοις, id  
est, *scripto juri*, opponit, post legatorum jura commemorat μὴ  
κωλύειν τοὺς νεκροὺς θάπτειν, non prohibere quominus sepe-  
lianturn mortui. Et Seneca pater inter jura non scripta, sed

Lib. i. contr.  
1.  
omnibus scriptis certiora ponit humum porrigerem cadaveri.  
Naturæ id jus appellant Hebræi Philo ac Josephus; et φύσεως  
Θεομοὺς, Isidorus Pelusiota: ut solere sub naturæ nomine

Jud. Bell.  
iv. 6. § 3.  
Epist. ill.  
Edid. 491.  
comprehendi mores communes naturali rationi consentaneos  
alibi diximus. Apud Elianum est: τῆς φύσεως τῆς κοινῆς  
ἀπαιτούσης τὸν μηκέτι ζῶντα κατακρύψαι cum mortuum

Lib. xii. 64.  
Lib. xiii. 30.  
condi ipsa imperet communis natura. Idem alibi: τὰ κοινὰ  
καὶ ἵσα πᾶσιν ἀνθρώποις vocat γῆν καὶ ταφὴν, terram ac  
sepulturam hominibus cunctis communia et ex aequo debita.

Ver. 378.  
Pene 2d. Tom.  
L. p. 202 n.  
Phars. vii.  
301.  
Theb. xii. 642.  
Ann. vi. 19.  
Orat. Funer.  
ses xxxi. 3.  
\*Leges hominum, νόμους βροτῶν dixit Euripides *Supplicibus*,  
κοινὸν νόμον Aristides, Lucanus hominum ritus, terrarum  
leges et mundi federa Papinius, sortis humanæ commercium  
Tacitus, spem communem orator Lysias. Qui impedit, ho-

1 Jus istud Sepultura a Lege Naturali  
quoque oritur. Vide quæ diximus ad  
PUFENDORF. De Jure Nat. et Gent.  
Lib. ii. cap. 3. § 23. not. 9. ultima  
Editionis. J. B.

\* Leges hominum] Φύσεως θεομούς,

### CHAPTER XIX. Of the Right of Sepulture.

I. 1 The Laws of Nations voluntarily instituted, direct also the sepulture of dead bodies. Dio Chrysostom, among the usages, which he opposes to *written law*, mentions, after the rights of legation, the usage of not refusing burial to the dead. So Seneca the father, Philo, Josephus, Isidore of Pelusium, who calls this *a law of nature*, the general natural habits of man being included in the term *nature*, as elsewhere noticed. So Euripides, Aristides, Lucan, Papinius [Statius], Tacitus. He who prevents it, puts off humanity, as Claudian says;

minem exuere, Claudio dicitur; naturæ dedecus facere, <sup>Bell. Gua.</sup>  
 Leoni Imperatori:  $\tau\eta\nu\circ\sigma\iota\alpha\nu\bar{\nu}\beta\rho\iota\zeta\epsilon\nu$ , fas violare, Isidoro <sup>v. 397.  
 Nov. ill.</sup>  
<sup>d. loco.</sup> Pelusiotæ.

2 Et quia veteres jura hæc hominibus bene moratis communia, quo sanctiora viderentur, ad Deos referebant auctores, ut legationis, ita et hoc jus Diis adscribi passim videmus. Itaque in dicta tragœdia *Supplicibus* <sup>b</sup> $\nu\circ\mu\nu\delta\alpha\mu\circ\omega\nu$  Deorum <sup>Ver. 563.</sup> legem dictam invenies, et apud Sophoclem *Antigone* Creonti, qui Polynicem humari vetuerat, ita respondit (vers. 460, et seqq.):

Decreta quippe hæc nec supremus Jupiter  
 Nec fas Deorum Manium dictaverat,  
 Queis alia jura debet humanum genus,  
 Nec id valere credidit jussus tuos,  
 Ut jura non conscripta, sed nutu Deum  
 Concessa, sempiterna, mortalis satus  
 Violare posses: non enim nuper vigent,  
 Sed ævo ab omni: initia in occulto latent.  
 Nonne ergo forti cordo, seposito metu  
 Mortalis iræ, par Deis magnis fuit  
 Me gerere morem?

3 Isocrates de bello agens Thescos adversus Creontem <sup>Panath. p.  
 203.</sup> ita loquitur: *Quis nescit, quis non didicit, vel in Dionysii ex tragædiarum auctoribus, quæ Adrasto mala circa Thebas contigerint, cum reducere volens Oedipodis filium, generum autem suum, Argivorum plurimos perdidit, ipsosque ductores vidit interemtos: ipse vero cum dedecore superstes, cum inducias ad humandos mortuos obtinere non potuisset, supplex Athenas venit, quam tunc civitatem Theseus regebat, eumque oravit ne viros tales inseptultos jacere pro nihilo duceret, neve pateretur proculcari antiquum morem, et jus*

naturæ leges. Eus. *Hist.* VIII. 19. (*De Martyrib. Palæstin.* cap. 9. pag. 425. *Edit. Cantabrig.* Vales. 1720.)

<sup>b</sup>  $\nu\circ\mu\nu\delta\alpha\mu\circ\omega\nu$ ] Sophocles *Ajace* (vers. 1149.) idem θεῶν νόμους dixit in *Antigone*. (versa. 462.)

disgraces humanity, as Leo; insults decency, as Isidore says.

2 This right, as being common to all civilized men, was referred to the gods as its authors. So in the *Supplices* of Euripides; the *Antigone* of Sophocles. [See.]

3 So Isocrates in several places\*, Herodotus, Diodorus, Xenophon, Lysias and Aristides†.

\* The passage about the Thebans is wrongly applied. J. B.

† The passage of Aristides is wrongly applied. J. B.

*patrium, quo omnes homines inter se utuntur, non quasi ab humana natura condito, sed tamquam imperato a divina potentia: quæ cum ille audiisset, sine mora legationem Thebas decernit.* Idem mox <sup>c</sup>Thebanos reprehendit <sup>d</sup>quod civitatis suæ decreta legibus divinis antehabuissent: ejusdemque historiæ et alibi meminit, Panegyrico, Helenæ encomio, Plataica oratione: Herodotus quoque Calliope, Diodorus Siculus historiarum quarto, Xenophon historiæ Græcæ sexto, et Lyrias ea quæ est in honorem sepulchorum: postremo Aristides in Panathenaico, <sup>e</sup>qui bellum hoc susceptum ait pro communi natura hominum.

4 Et passim apud laudatos auctores videmus egregia virtutum nomina huic officio tribui. Nam humanitatem vocant

<sup>f</sup>Cicero et <sup>g</sup>Lactantius, humanitatem ac mansuetudinem Valerius Maximus, misericordiam et religionem Quintilianus, misericordiam et humanitatem Seneca, *οἰκτον τῆς κοινῆς φύσεως miserationem communis naturæ* Philo, sortis humanæ commercium Tacitus, misericordiam et pietatem Ulpianus, Modestinus memoriam humanæ conditionis: clementiam Capitolinus: *δίκην*, sive justitiam Euripides et Lactantius: opus benignum Prudentius. Contra Donatistas, qui Catholicorum corpora se-

Cic. Orat.  
pro Quint.  
Lact. Inst.  
vi. 12.  
Val. Max. v.  
1.  
Quint. xii.  
c. ult. Inst.  
Orat.  
Ser. de Benef.  
v. 20.  
Lüb. de Jos.  
p. 530 n.  
Ann. vi. 19.  
L. 14. § 7. D.  
de Rel.  
L. 37. ff. de  
Cond. Inst.  
Capit. in M.  
Anton. Phil.  
c. 13.  
Supplíc. vs.  
379, 526, 630.  
Lact. vi. 12.  
n. 31.  
Cath. Hymn.  
x. 63.

<sup>c</sup> *Thebanos reprehendit*] Pacto, non prælio, obtentum a Thebanis ius sepeliendi vult Plutarchus *Theseo* (pag. 14.) At prælio Pausanias *Atticis* (c. 39.)

<sup>d</sup> Non: sed ut ostendat, quanta esset auctoritas Atheniensium, observat, eos, qui Thebis plurimum poterant, majorem rationem habuisse illorum postulationis, quam Legum ab ipso Numine latarum, de jure sepulturae: Τὸν δὲ κυρίου δυτας Θηβῶν οὐται διαθέστας, ἦστ' ἐλέσθαι μᾶλλον αὐτοὺς ἔμειναι τοῖς λόγοις ὑπὸ τῆς πόλεως ἐκπεμφθεῖσιν, η̄

τοῖς νόμοις τοῖς ὑπὸ τοῦ Δαιμονίου κατασταθεῖσι] pag. 269 c. Auctor, dum festinans legeret, nec ad seriem orationis adtenderet, verba, ὑπὸ τῆς πόλεως, intellexit de Thebis; quum de Athenis agatur. J. B.

<sup>e</sup> Locus est pag. 204 a. Tom. I. Ed. Paul. Steph. Sed ibi agitur de alio bello, nimirum de expeditione adversus Amazonas: quod exemplum, quum statim subjiciatur illi, de quo Auctor heic, ideo unum idemque esse putavit; eo facilius, quod ibi est κάνταθα. J. B.

4 And names implying Virtue are given to this office, as *humanity\**, *mercy*, *compassion*, *religion*, *a feeling for our common nature*, *a recollection of our human condition*, *a work of kindness*. [See the authors.] The Donatists who refused burial to the bodies of Catholics are accused of *impurity*. So Papinius [Statius]. Spartan says that such are *without reverence for humanity*. So Livy, Homer, Lactantius. [See.]

II. 1 There are different opinions as to the origin of this prac-

\* An expression which, in this sense, Grotius wrongly ascribes to Cicero. J. B.

peliri vetabant, impietatis accusat Optatus Milevitanus. Apud opt. vi.  
Papinium (*Theb.* XII. 165):

Bello cogendus et armis  
In morea hominemque Creon.

Spartianus tales ait esse sine humanitatis reverentia: Livius Spart. *vii.*  
sævitiam vocat ultra humanarum irarum fidem. <sup>Curae. c. 4.</sup> Homerus Lib. VIII. 24.  
dixerat ἀεικέα ἐργα. Eorum qui supervacaneam facerent se-  
pulturam, Lactantius impiam vocat sapientiam. Eandem ob Lib. VI. 12.  
causam impius Eteocles Papinio. <sup>Theb. III.</sup>  
<sup>v. 98.</sup>

II. 1 Quæ primum causa moris hujus introducendi fuerit  
ut corpora humo tegerentur, sive condita prius, ut apud  
Ægyptios, sive cremata, ut apud Græcos plerosque, sive ita uti  
sunt, quem morem esse antiquissimum notavit Cicero et post  
eum Plinius, de eo non idem omnibus videtur. Nam Moschion  
existimat occasionem datam ex gigantea feritate mandendi  
homines, cuius abolitæ signum sepulturam; ita enim ait:

Tunc morto raptos imperatum legibus  
Mandare terræ, pulveromve inspargere  
Necrum sepultis, ne darentur conspici  
Abominanda signa pastus pristini.

Apud Stob.  
*Ecl. Phys.*  
Tit. xi.  
[[Lib. I. cap.  
I. § 38. vv.  
51-54.]]

2 Aliis videntur hoc modo homines velut sponte solvisse  
debitum, quod alioqui vel ab invitis repetit natura. Nam

\* Nullibi in Oratione Ciceronis, ad  
quam remittit margo, reperitur vox hu-  
manitatis, juri sepulture admodumata.  
Originem erroris, in hoc et aliis locis  
laudatis, ostendent Notæ nostræ Gal-  
licæ: harum enim modus non patitur,  
ut omnia dicamus, præsertim in isto et  
precedenti Capite, quæ omnium maxime  
talibus αἴλεψίαι scatent. J. B.

<sup>a</sup> Lactantius] Cujus et hoc est Lib.  
VI. c. 12. Ultimum illud et maximum  
pietatis officium est, peregrinorum et

pauperum sepultura.

<sup>b</sup> Homerus dixerat ἀεικέα ἐργα]  
Idem *Iliados* o' Jovem et Deos Achilli  
iratos fuisse dicit, ob male tractatum  
corpus Hectoris, [vers. 113, et seqq.  
Locus autem in contextu laudatus est  
*Iliad.* XXII. 395. et XXIII. 24. J. B.]

<sup>c</sup> Plinius] *Historia Naturalis* VII.  
54. ubi et hoc: Sepultus intelligitur  
quoquo modo conditus: humatus vero,  
humo contectus.

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tice of burying bodies; either first embalming them, as the Egyptians did; or burning them, as among the Greeks mostly; or without preparation, which Cicero notes as the oldest practice. Moschion thought the custom intended to be a memorial of the abolition of the practice of eating human bodies. [See.]

2 Others regard it as a willing payment of a debt to Nature, which, if not given, she will take. That man is made from earth, was not only told to Adam by God. Cicero also quotes from Euripides, *Earth to earth*; and in Eccl. xii. 7, we read, *Then shall the dust return to the*

hominis corpus ex terra ortum terræ deberi, non Deus tantum Adamo edixit, sed et Græci Latinique passim agnoscunt.

*Tusc. Q. III. 25.* Cicero ex Euripidis Hypsipyle :

Reddenda terræ terra.

*Ecccl. XII. 7.* Et quod apud Salomonem legimus pulverem quidem ad terram redire quale fuerat, spiritum autem ad Deum qui dederat, Euripides hoc ipsum argumentum ex persona Thesei in *Suplicibus* tractans sic ait (vers. 531, et seqq.) :

Jam sinite terræ mortuos gremio tegi :  
Res unde queque sumserat primordium  
Eo recipitur : spiritus cœlo redit,  
Corpusque terræ : jure nec enim mancupi,  
Sed brevis ad ævi tempus utendum datur :  
Mox terra repetit ipsa quod nutriverat.

Lucretius similiter de terra (Lib. v. vers. 1260) :

Omniparens eadem rerum est commune sepulchrum.

*Cap. 22.* Cicero de *Legibus* II. ex Xenophonte : redditur terræ corpus, et ita locatum ac situm quasi oportento matris obducitur.

\* Ex terra ortum terræ deberi] Job. x. 9. Philo in *Flaccum* : ἀνθρώποις οἱ φύσις οἰκεῖότερον χωρὸν ἀπένειμε γῆν, οὐ μόνον ζῶσιν, διλὰ καὶ ἀποθανοῦσιν, οὐτὶ καὶ τὴν πρώτην ὑποδέχηται γένεσιν, καὶ τὴν ἐκ τοῦ βίου τελευταίαν ἀνάλυσιν. Proprium hominibus locum natura terram tribuit, nec vivis tantum, sed et mortuis, ut eadem quo primos suscepit natales, suscipiat et ex hac vita exitum. (Pag. 991 c.) Attamen, sicut nullum est in homine factum laudabile, cuius non vestigium in alio aliquo animalium genere Deus posuerit, ita et in hac re evenit: de Formicis Plinius libro XI. 30. Sepeliuntur inter se viventium sola, præter hominem. At si ipse de Delphinis Lib. IX. 8. conspectue

jam defunctum portantes ne laceraretur a bellis. Et de Apibus Virgilius (*Georg.* IV. 256) :

Tum corpora luce carentum,  
Exportant tecta, et tristia funera ducunt.

Servius : cum exsequiali scilicet pompa.

\* Non id dixit Democritus : sed ecce verba PLINII, quorum sensum mutavit Auctor, dum ex memoria citaret, vel festinanter legeret: Similis est et de ad-servandis corporibus hominum, ac re-vivisciendi, promissa Democrito vanitas, qui non revixit ipse. Agitur ibi tantum de resurrectione quadam, cuius imaginem sibi fixerat Philosophus, quamque Plinius vocat ad-servacionem corporum humanorum. Auctor vel legit, vel in mente habuit, quasi verba sic posita

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*earth as it was, and the spirit shall return to God who gave it.* See Euripides; Lucretius; Cicero, from Xenophon. Pliny says that the earth receives us when we are born\*, nourishes us as we grow up, feeds us at every age, and at last receives us into its bosom as a mother, when the rest of nature rejects us.

3 Others think that the hope of the resurrection was intended to be marked by this practice, and transmitted to posterity. So Demo-

\* Referring to the practice of laying a new-born child on the ground. Gronov.

Plinius quoque scripsit, terram nos nascentes excipere, natos <sup>Hist. Nat.</sup>  
<sup>ii. 63.</sup> alere, semelque editos sustinere semper, novissime complexam  
gremio jam a reliqua natura abdicatos, ut matrem operire.

3 Sunt qui resurrectionis spem a primis humani generis parentibus, hoc veluti monumento, posteris consignatam putant. Nam et ob reviviscendi promissum adservanda corpora docuisse <sup>5</sup> Democritum Plinius testis est, libro septimo, capite quinquagesimo quinto. Christiani autem sæpe morem honeste condendi corpora ad hanc spem referunt. Prudentius:

*Hymn. x. ss.  
et seqq.*

Quidnam sibi saxa cavata,  
Quid pulchra volunt monumenta,  
Nisi quod res creditur illis  
Non mortua, sed data somno?

4 Simplicius est, cum homo cæteris animantibus præstet, indignum visum si ejus corpore alia animantia pascerentur: quare inventam sepulturam ut id quantum posset caveretur. Miseratione hominum custodiri corpora <sup>b</sup> ab incursu avium ferarumque dixit Quintilianus. Apud Ciceronem de Inventione <sup>Dec. vi. p.</sup>  
<sup>48.</sup>

essent; *De adseruandis corporibus hominum, ob REVIVISCENDI PROMISSA.*  
*J. B.*

<sup>b</sup> *Ab incursu avium ferarumque]* Vide vaticinium de Jeroboami posteritate in peccatum ejus, 1 Regum xiv. 11. Et Tertullianum *de Resurrectione. De Ægistho Homerus Odyssee* Γ. (vers. 258):

Τῷ τε οἱ οὐδὲ θανόντι χυτὴν ἵτι γαῖαν ἔχουν,  
Ἄλλ’ ἄρα τόγε κύνες τε καὶ οἰωνοὶ κατέβακαν.

Ergo nec leviter glebam injecere peromto.  
Illius ut volucres lacernant ossa canosca.

*De Ægistho* loquitur, quem ut adulterum et regni invasorem Argivi inse-pultum abjecerant, [immo abjecturi fuissent, si Argis fuisset. Inspice locum. *J. B.*] cuius tamen reliquias

humanior terræ dedit Orestes, ut mox dicetur. Menelaus de Ajace in Sophocle (*Ajac.* vers. 1083):

Ἄλλ’ ἀμφὶ χλωρὰν φύσιμαθον ἐκβεβλημένος  
Ορνιτὶ φορῇ παραλίους γυνήστα.

Sed ille arenis iactus in pallentibus,  
Gratum marinis pabulum alitibus dabit.

Sed hoc quoque ibi prohibet Ulysses, prudentiam exemplar. Sophocles *Antigone* in ipsius Antigones laudem (vers. 711, et seqq.):

Ἔπει τὸν αὐτῆς αὐτάδελφον δὲ φορᾶς  
Πεντάτ’ ὀδεστον, μῆθ’ ὑπ’ αἰηστῶν κυνῶν  
Εἴσοι ὀλέσθας, μῆθ’ ὑπ’ οἰωνῶν τυσος.

Illa obdūtum crux germanum suum  
Non inscpultum sicut alitibus feris,  
Canibusque fieri pabulum mordacibus.

Appianus civilium 1. *de intersectio jussu*

critus seems to have thought\*. The Christians often refer the practice of burial to this hope. So Prudentius; *What mean hollowed stones, what mean sculptured tombs, save that what we trust to them is not dead, but sleepeth?*

4 It is more simple to say, that considering the superiority of man to other animals, it was deemed unworthy of him that other animals should feed on him, and that sepulture was invented to obviate this.

\* The passage is wrongly quoted and misunderstood. *J. B.*

*Cap. 25.* primo : *a feris vexatus, communi honore in morte caruit.*  
Et apud Virgilium legimus (*AEn. x. 557, et seqq.*) :

Non te optima mater  
Condet humo, patroive onerabit membra sepulchro :  
Alitibus linquere feris.

*Jer. xxii. 19.  
1 Kings xxi.  
19.* Et Deus in visis sibi regibus minatur apud prophetas, futurum, ut asini sepulturam habeant, ut canes eorum sanguinem lignant. Nec aliud in sepultura considerat Lactantius cum ait : *Non enim patiemur figuram et figmentum Dei, feris ac volucribus in praedam jacere;* et Ambrosius, cujus haec verba sunt : *Nihil hoc officio præstantius, ei conferre, qui jam tibi non potest reddere: vindicare a volatilibus, vindicare a bestiis consortem naturæ.*

5 Sed etsi tales abessent injuriæ, proteri tamen ac lancinari corpus humanum, alienum merito videtur ab istius naturæ dignitate. Unde non abit illud in Sopatri controversiis : ὅτι τὸ θάπτειν καλὸν, καὶ ὅτι τοιοῦτον ἡ φύσις ἔχειρε τοῖς σώμασιν, ἵνα μὴ διαλυόμενα μετὰ θάνατον γυμνὰ, καθάπερ αἰσχύνηται. τοῦτο τῇ φύσει καλὸν, τοῦτο φιλάνθρωπον. τοῦτο τοῖς ὄλοις δοκεῖ, εἴτε θεοί εἴτε τινὲς ήρωες ταύτην μετὰ θάνατον τοῖς ἀνθρώποις τὴν τιμὴν κατεστήσαντο. ἐπειδάν καὶ οὐκ εὔλογον τὰ τῆς φύσεως ἀπόρρητα μετὰ τὴν τελευτὴν ἄπασι δείκνυσθαι, γῆ κρύπτειν τὸν ἀνθρωπὸν νενομίκαμεν ἄνωθεν, ἵνα τῷ καλύπτεσθαι μνήματι ἐλάνθανε τὸ σῶμα διαλυόμενον. *Honestum esse humare mortuos, et ab ipsis natura quasi concessum corporibus, ne velut probro afficiantur post mortem si nuda diffluant:* [hoc natura esse honestum, hoc humanum :] placere id omnibus, sive Dei fuerint sive semidei, qui hunc functis vita corporibus hono-

*Marii : ταφήν τε οὐδενὶ δέξῃν ἐπενεγκεῖν εἰς οὐδένα τῶν διναιρουμένων, δλλ' οἰωνοὶ καὶ κύνες ἄνδρας τοιούσδε διεσπάσαντο. Nec cuiquam licebat quemquam intersectorum sepelire, sed viros tam egregios lacerabant aves et canes,* (pag. 394. Ed. Steph.) Ammianus Marcellinus

principio libri xvii. de Julianō : *Sollitusque ne diræ volucres consumerent corpora peremtorum, sine discretione cunctos humari mandavit,* (cap. 1.)

<sup>1</sup> *Tὴν ἀσχημοσύνην τῆς φύσεως] Simili modo Agathias dicit moris esse τὰ αἰσχυντηλά τῶν οὐδίνων ἐπικαλύπτειν.*

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The pity of men protects the body from birds and beasts, says Quintilian. To be devoured by beasts was considered shocking. So Cicero, Virgil, Jerem. xxii. 19, 1 Kings xxi. 19, Lactantius, Ambrose.

5 And even without regarding such insults, it seems unfit for the dignity of man's nature that his body should be torn and crushed. So

*rem indulserunt. Quia enim a ratione alienum est, naturæ humanæ arcana post mortem omnibus conspicua exponi, morem inde ab antiquo accepimus humana corpora sepeliendi, ut monumento condita clam et procul a conspectu tabescant: quo et illud pertinet Gregorii Nysseni in epistola ad Letoium: ὡς μὴ ἀναδειχθῆναι τῷ ηλίῳ ἡ τὴν ἀσχημοσύνην τῆς φύσεως, ne soli ostendatur id quod dedecori est humanæ naturæ.*

6 Hinc est quod officium sepeliendi, non tam homini, id est, personæ, quam <sup>k</sup>humanitati, id est naturæ humanæ, præstari dicitur: unde publicam hanc humanitatem dixerunt Seneca et Quintilianus, tralatitiam Petronius. Cui consequens est, ut nec inimicis nec hostibus invideri sepultura debeat. De inimicis egregia est apud Sophoclem dissertatio <sup>6</sup>Ulyssis pro humando Ajace, ubi hoc inter cetera:

Menelae, post tot dicta sapienter, cave  
Injuriosus sis in hominem mortuum.

Rationem reddit Euripides *Antigone*:

Mors jungorum finis est mortalibus:  
Num majus aliud quid potest letho dari?

Idem *Supplicibus* (vers. 528, 529):

Fecore vobis siquid Argivi male,  
Cecidere; in hostes ista vindicta est satis.

Et Virgilius (*Aen.* xi. 104):

Nullum cum victis certamen et æthere cassis.

Quam sententiam citans scriptor ad Herennium addit: <sup>7</sup>Nam quod malorum est extrellum, accidit illis jam. Papinius: <sup>Tra. iii. 573.</sup>

Bellavimus: esto:

Sed cecidere odia, et tristes mors obruit iras.

Et eandem causam reddit Optatus Milevitanus: *Si inter vi-*

*Obtegere puerperii pudorem.* (Lib. v. c. 6.)  
Ita quam nihil natura simus appareat in ortu et interitu. Quod ut significantare Sapientes Hebrei, veteres, ne plebeii aut summa fortunæ qui essent, alias modi fasciis involverentur, aut modo nati aut mortui.

<sup>k</sup> Humanitati, id est naturæ humanæ præstari dicitur] Servius ad xi. *Aeneidos*: Sepulture enim beneficium generaliter debetur universis, (ad vers. 106.)

<sup>6</sup> Non Ulyssis, sed Chori, vers. 1110, et seqq. J. B.

<sup>7</sup> Nullibi in libris ad Herennium hoc

Sopater, Gregory Nyssen.

6 Hence the office of burial is conceived as rendered, not so much to the man, that is, the particular person, as to Humanity, that is, to Human Nature. So Seneca and Quintilian call it *public humanity*, Petronius, *transferred humanity*. And hence it follows, that sopol-

*ventes fuerat certamen, odia vestra vel mors aliena compescat: jam tacet cum quo ante litigabas.*

III. 1 <sup>1</sup>Quare et hostibus publicis deberi sepulturam omnes sentiunt. Belli hoc jus κοινὸν ἐν τοῖς πολέμοις vocat Appianus, belli commercia Philo. Tacitus: *Ne hostes quidem sepulturam invident.* Dio Chrysostomus servari hoc jus ait etiam ἐν τοῖς πολεμίοις, apud hostes: addit: καν εἰς ἑσχάτην ἔχθραν προέλθωστε etiamsi ad summum odia processerint. De eadem re agens Lucanus hominum ritus in hoste servandos dixit. Sopater idem qui supra: τις πόλεμος ταύτης τῆς τιμῆς τὸ τῶν ἀνθρώπων γένος ἐστέρησε, τις ἔχθρα μνησικακήσασα πρὸς τὰ πλημμελήματα παραβῆναι τὸν θεσμὸν τοῦτον ἐνέσχετο; *Quod bellum hoc ultimo honore humanum privavit genus?* quae inimicitia eosque extendit malefactorum memoriam, ut hanc legem violare auderet? Is quem dixi Dio Chrysostomus oratione de lege: διὰ τούτου τοὺς ἀποθανόντας οὐδεὶς ἔτι κρίνει πολεμίους, οὐδὲ τὴν ἔχθραν

Pag. 63.  
In Flacc.  
P. 974 A.  
Ann. I. 32.  
Oral. de  
Consul.  
p. 649 c.

Phars. vii.  
801.

Pag. 647 D.

reperitur. Habet Auctor ex ALBERICO GENTILI, *De Jure Belli*, Lib. II. cap. 24. pag. 459. Edit. Hanov. ubi locus plenus adfertur, tamquam ex III. *Rhet. ad Herenn.* qui liber, utipse postea observat, pag. 531. non est Ciceronis, si Virgiliana habet. Post primam Editionem, casu incidi in fontem erroris. Scriptor Neapolitanus, Ant. Sebastian. Minturnus, Lib. III. *De Poeta*, pag. 207. Ed. Venet. 1559. adlato Virgilli versu, statim de suo subjicit: *Quippe quibus tum accidit, quod malorum omnium extremum est.* Hæc quum legisset, ipse Italus, Alberic. Gentilis, et memoriter laudavit, et ex vetusto Auctore Libb. ad Herennium sibi animo retenta putavit, ita ut etiam verba quædam paululum immutaverit.

Ejusmodi lepida, ut ita dicam, παροράματα, plura forte deprehenderemus, si semper indagari aut se se offerre possent loca, ubi cubile est citationum per manus ab uno libro in alium propagatarum. J. B.

<sup>1</sup> Quare et hostibus publicis deberi sepulturam omnes sentiunt] Philo in Flaccum: ηδη δὲ καὶ τὸν πεσόντας ἐν τῷ πολέμῳ τῶν ἔχθρῶν ταφῆς αἴγιοῦσιν, οἱ μὲν ἐπιεικεῖς καὶ φιλάνθρωποι ταῖς οἰκοθεν δαπάναις, οἱ δὲ τὴν ἔχθραν καὶ πρὸς τὸν νεκροῦ ἀποτείνοντες, ὑπόσκονδα τὰ σώματα διδόντες ὑπὲρ τοῦ μὴ τῆς τελευταίας χάριτος ἀμοιρῆσαι τῶν νομίζουμένων. *Etiam qui in bello occubuerunt eos homines solent ad sepulturam dare, illi quidem quibus*

ture ought not to be withheld, either from our friends or from enemies. See this thought in the *Ajax* of Sophocles: in Euripides: in Virgil, and the writer to Herennius, who quotes him\*. So Papinius [Statius] and Optatus speak of death terminating all enmity.

III. 1 Hence all agree that sepulture is due to public enemies; and is a right of war. So Appian, Philo, Tacitus, Dio Chrysostom, Lucan, Sopater, Dio Chrysostom again.

\* A mistake of Grotius, which Barbeyrac has ingeniously traced.

*καὶ τὴν ὕβριν εἰς τὰ σώματα αὐτῶν ἐπιδείκνυται· propter hanc mortuos nemo hostes judicat; neque ira et contumelia in eorum corpora extenditur.*

2<sup>m</sup> Et passim extant exempla. Sic Hercules suos hostes, <sup>Aelian. Ver. Hist. xii. 27.</sup> Alexander victos ad Issum, Hannibal C. Flaminium, P. Aemilium, Tiberium Gracchum, <sup>a</sup> Marcellum, Romanos quæsivit ad sepulturam. *Credas*, inquit Silius Italicus, *Sidonium cecidisse ducem*. Idem Hannoni a Romanis præstitum, Mithridati a Pompeio, a Demetrio multis, Archelao regi ab Antonio. In Græcorum adversus Persas militantium juramento erat: *Socios omnnes sepeliam: bello victor etiam barbaros*: et passim in historiis legas impetratam νεκρῶν ἀναίρεσιν, <sup>b</sup> *facultatem tollendi mortuos*. Apud Pausaniam in Atticis exemplum est: *τοὺς δὲ Μήδους Ἀθηναῖοι μὲν θάψαι λέγουσιν, ὡς πάντως ὅσιον ἀνθρώπου νεκρὸν γῆ κρύψαι· Medos Athenienses a se sepultos aiunt, quia qualemcumque mortuum terra condi fas sit.*

*bonitatis et humanitatis plus est, suopte impendio, alii vero qui odia et in mortuos extendunt, sub pactis dantes corpora, ne careant eorum quæ mos imperat honore ultimo,* (pag. 974 A. Ed. Paris.)

<sup>n</sup> Et passim extant exempla] Josephus in *Legibus*: θακτέσθωσαν δὲ καὶ οἱ πολέμοι. *Sepeliantur et mortui [hostes. Ant. Jud. iv. 8. § 24. Edit. Hudson.]* Agamemnon Trojanos sepelit *Pliados H.* (vers. 396, et seqq.) Antigonus Pyrrhum apud Plutarchum, (pag. 406.) Vide eundem in *vita Thesei*, (pag. 14 A.)

<sup>o</sup> *Marcellum*] Plutarchus *Marcello*, [pag. 316. Adde CICERONEM, *De Senect. c. 20.*]

<sup>p</sup> Habet hoc Auctor procul dubio e

DIODORO SICULO: sed dum pravam interpunktionem sequitur, festinanter legendō, sensum plane alienum nobis offert. En verba Græca: Ἄλλὰ τοὺς ἐν τῷ μάχῃ τελευτήσαντας τῶν συμμάχων πάντας θάψω· καὶ κρατήσας τῷ πολέμῳ τῶν βαρβάρων, οὐδεμίαν τῶν δύωνισαμένων πόλεων ἀνάστατον ποιήσω. &c. Id est: Sed socios in prælio mortuos omnes sepeliam: ubi vero bello Barbaros vicer, nullam urbium devictarum vastabo &c. Lib. xi. cap. 29. pag. 258. Ed. H. Steph. Vides ibi de Sepultura hostium nequaquam agi. J. B.

<sup>o</sup> *Facultatem tollendi mortuos*] Vide infra Lib. III. c. xx. § 45.

2 And examples occur in abundance. Enemies were buried by Hercules, Alexander, Hannibal; of the latter case Silius says, *You might have supposed the dead man a Sidonian leader.* So the Romans buried Hanno; Pompey, Mithridates; Demetrius, several: Antony, Archelaus. The oath of the Greeks who marched against the Persians included this\*. And we constantly read in history that the vanquished obtained permission to bury their dead. So Pausanias says the Athenians buried the Medes.

\* A mistake of Grotius, as Barbeyrac shows.

<sup>Aelian. Ver. Hist. xii. 27.</sup>  
<sup>Diod. Sic. xvii. 40.</sup>  
<sup>Liv. xxii. 7.</sup>  
<sup>Ibid. c. 52.</sup>  
<sup>Item, xxv. 17.</sup>  
<sup>De B. Pisa. xv. 389.</sup>  
<sup>Val. Max. v. i. 2.</sup>  
<sup>App. Alex. p. 380.</sup>  
<sup>Vid. Plut. in Cius Fil. p. 396 A.</sup>  
<sup>Item, Fil. Ant. p. 917 n.</sup>  
<sup>Lib. i. 32.</sup>

3 Quare Hebræorum veterum interpretatione Pontifex

*Levit. xxl. 1. et seqq.* Maximus, cum alioqui rei ulli funebri interesse vetaretur, repertum tamen hominem <sup>9</sup>insepultum sepelire etiam jubeatur. Christiani vero tanti fecerunt sepulturam, ut ejus causa, sicut ad pauperes alendos, aut ad captivos redimendos, vasa ecclesiæ etiam initia conflari aut vendi liceat existimaverint.

4 Sunt quidem et exempla in contrarium, sed communi judicio damnata:

Hunc oro <sup>9</sup>defende furorem:

est apud Virgilium (*AEn.* x. 905):

Hominemque cruentus  
Exxit, et tenuem cæsis invidit arenam.

*De Bell. Grec.* Apud Claudio. Diodorus Siculus: τὸ πολεμεῖν τῶν ὄμοφύλων τοῖς τεθνηκόσι θηριώδες ferinum est bellum gerere cum mortuis qui ejusdem naturæ fuerint.

*Bell. Jud. v. 19.* IV. 1 De insigniter tamen facinorosis video esse dubitandi causas. Lex divina Hebreis data, ut omnis virtutis ita et humanitatis magistra, illos ipsos qui suspensi patibulo erant (quod valde ignominiosum censebatur. Num. xxv. 4; Deut. xxi. 23; 2 Sam. xxi. 13) eodem die sepeliri jubet. Hinc Josephus tantum Judæis ait esse curam sepulturæ, ut eos etiam quorum corpora ad publicum supplicium damnata sunt, ante solis occasum tollant et humo mandent: et alii Hebræorum interpres addunt exhibitam hanc reverentiam divinæ imagini ad quam homo sit conditus. *Ægisthum, qui adulterium cæde*

*Bell. Jud. iv. 5. § 2.*

<sup>9</sup> Insepultum sepelire etiam jubeatur] Idem ex jure pontificio Romano

Servius notat (ad *Aeneid.* vi. 176.)

<sup>9</sup> Defende furorem] Interpretatur

Servius, *Inimicorum iram et post fata sævire cupientem.*

<sup>9</sup> Sepulturæ tradi non vetamus] Hujus Romanorum moris mentio est apud

3 The Hebrew High Priest, though on other occasions forbidden to have anything to do with a funeral, was yet commanded to bury a dead body if he found it by accident. Christians thought the burial of the dead so important, that in order to do it, as in order to relieve the poor, or to ransom captives, they thought it lawful even to sell the consecrated vessels of the church.

4 There are examples of burial denied, but they are condemned by the common judgment. See Virgil, Claudio, Diodorus.

IV. 1 With regard to great criminals, there seem to be doubts. The Hebrew law directed the bodies of those who were publicly executed to be taken away and buried before sunset: and the commentators note this as an evidence of reverence for the divine image in

regis cumulaverat, a regis interfecti filio Oreste humo mandatum Homerus memorat Odysseæ tertio. Sed et apud Romanos Ulpianus corpora eorum qui capitum damnantur cognatis ait neganda non esse: imo et quibuslibet potentibus danda censuit Paulus jurisconsultus. Et Diocletianus ac Maximianus Imperatores ita responderunt: *obnoxios criminum digno supplicio affectos sepulturæ tradi non vetamus.*

Vv. 309, 310.  
Lep. 1. ff de  
cad. Paus.

Lib. III. art.  
Lib. II. C. de  
Relig.

2 Legimus quidem in historiis exempla eorum, <sup>qui inse</sup>pulti abjecti sunt, frequentiora civilibus quam externis bellis: et hodie videmus quorundam damnatorum corpora diu in publico conspectu relinqui: qui tamen mos an laudandus sit disputant, non politici tantum, sed et theologi.

Roch. de  
Constat. f. 12.  
Abb. in c. ex  
part. de sp.  
Sylv. in Verba  
Sepult.  
Quest. 12.

3 Contra, laudatos videmus qui sepeliri jusserunt corpora eorum, qui id ipsum aliis non permiserant, ut Pausaniam Lacedæmoniorum regem, qui incitatus ab Æginetis ut Persarum factum in Leonidam simili facto ulcisceretur, consilium ut se ac Græco nomine indignum rejicit. Apud Papinium Theseus Creontem sic alloquitur (*Theb. XII. 780*):

Vade atra daturus

Supplicia, extremique tamen secure sepulchri.

Alexandrum quoque Jannæum regem, qui in mortuos populares valde contumeliosus fuerat, sepelierunt Pharisæi. Quod si Deus interdum sepulturæ jactura quosdam puniit, fecit hoc suo jure supra leges constitutus. Et quod Goliathi caput David servavit ostentui, factum scilicet in alienigenam, Dei

Jea. Ant. XIII.  
16. et Gordon.

Philonem contra Flaccum, (pag. 977 A.) (Ant. Jud. Lib. XIII. c. xv. § 4. Ed. Hudson.) Adde Quintilianum declamatione quarta, (cap. ix. Ed. Burman.)

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which man is made. Egisthus was buried by Orestes. Among the Romans, the bodies of those executed were not denied to their relatives; or even to any who asked for them, as Paulus thought. So Diocletian and Maximian directed.

2 Examples of bodies thrown out unburied, are more common in civil than in foreign wars. And at this day, some criminals are gibeted and left in public view: but whether this be a laudable practice, is disputed both by politicians and by theologians.

3 On the other hand, we find persons praised, for ordering the bodies of those to be buried who had themselves refused the rite to others, as Pausanias. So Statius makes Theseus act to Creon. So the Pharisees buried Alexander Jannæus. If God punished some by

contemtorem, et sub ea lege quæ proximi nomen ad solos Hebræos porrigebat.

V. 1 Unum tamen notatu non indignum, de sepeliendis mortuis regulam apud ipsos Hebræos habuisse exceptionem

<sup>9</sup> eorum qui ipsi sibi mortem conciverant: quod Josephus nos *De Bell. Jud.* lib. iii. 17. docet. Nec id mirum, cum in hos aliud supplicium constitui

<sup>Gel. xv. 10.</sup> non possit qui mortem pro suppicio non habent. Sic Milesiæ *Plut. de M. C.* virgines a voluntaria morte absterritæ, et <sup>t</sup>plebs olim Romana,

<sup>Plin. xxxvi. 15.</sup> quanquam improbante Plinio. Sic et Cleomenis corpus, qui se interfecerat, Ptolomæus suspendi jussit. Et <sup>u</sup>passim re-

<sup>Plut. Ag. et Cleom. Vit.</sup> ceptum, ait Aristoteles, ut ignominia aliqua afficiantur qui sibi mortem conciverunt: ubi Andronicus Rhodius id exponens

<sup>p. 623.</sup> ait, sepultura eorum corpora prohiberi: quod inter alia Demonassæ Cypri Reginæ scita laudat Dion Chrysostomus. Neque huic mori obstat quod Homerus, Æschylus, Sophocles, Moschio, et alii monent, nihil sentire mortuos: quare nec damno

*Orat. Ixv.*  
p. 692 D.

*Vid. Stob.*  
*Tl. 126. et*  
*Soph. Ajac.*

<sup>9</sup> Exceptio illa hoc tantum efficiebat, ut cadavera eorum, qui sibi ipsi mortem conciverant, usque ad Solis occasum manerent insepulta. Ita diserte JOSEPHUS, loco in ora libri indicato: Τοὺς γοῦν δυελόντας ἑαυτοὺς, παρὰ μὲν οἵμιν, μέχρις ἡλίου δύσεων ἀτάφους κρύπτειν ἄκρινα, καὶ τοι καὶ πολεμίους θάπτειν θέμιτον ηγούμενοι &c. HEGESIPPIUS autem loquitur de moribus et legibus aliorum Populorum: *Hec non solum moribus hominum, sed etiam legibus, interdicta accipimus: namque alii insepultos projici jubent eos, qui se in ferrum dejecerunt... alii dextram manum absindunt defunctis, &c.* Hoc ultimum genus poena receptum erat Athenis, ut

Auctor ipse observat mox, Nota u.  
J. B.

<sup>t</sup> *Plebs olim Romana] Servius ad 12. Æneidos: Sane sciendum quod cautum fuerat in Pontificalibus libris, ut qui la- queo vitam finisset insepultus abjeceretur. Unde merito ait INFORMIS LETIBI, quasi mortis infamissimæ. Ergo cum nihil sit hac morte deformius, Poetam etiam pro Regine dignitate dirisse accipiamus. Cassius autem Hemina ait Tarquinium Superbum, cum cloacas facere populum coegisset, et ob hanc injuriam multi se suspendero necarent, jussisse corpora eorum cruci affigi... Tunc primum turpe habitum est mortem sibi consciiscere, (ad vera 603.)*

denying them sepulture, he did this by his own right. David's proceeding with Goliath's head was no general case.

V. 1 The Hebrews, however, made one exception, in the case of those who had died by their own hands. And this is fit; for there can be no other punishment, for those to whom death is no punishment. So the Milesian virgins, and the Plebs at Rome were deterred from suicide. So Ptolemy ordered the body of Cleomenes to be hung. And it is, says Aristotle, a common practice, as Andronicus explains him. And on this ground, Dion lauds Demonassa, queen of Cyprus. And it is no objection, that, as the poets sometimes say, the dead feel nothing, and are not affected by loss or shame. For it is enough if

nec pudore affici. Satis enim est, id quod mortuis accidit, a vivis metui, ut hoc pacto a peccato retrahantur.

2 Optime enim Platonici contra Stoicos, et si qui alii servitutis et morbi fugam, imo et spem gloriae pro justa causa mortis voluntariæ admittebant, sentiunt retinendum animum in custodia corporis, nec injussu ejus, a quo ille nobis est datus, ex hac vita demigrandum; quam in rem multa videre est apud Plotinum, Olympiodorum, et Macrobius ad somnium Scipionis.  
<sup>1</sup>Hanc sententiam secutus Brutus olim Catonis factum, quod imitatus postea est, <sup>x</sup>damnaverat, *ως οὐχ ὅσιον οὐδὲ ἀνδρὸς* Plut. v. u. Brut. p. 1002 ε.  
*έργου ὑποχωρεῖν τῷ δαίμονι, καὶ μὴ δέχεσθαι τὸ συμπίπτον*  
*ἀδέως, ἀλλ᾽ ὑποδιόρασκεν* <sup>quippe nec pius censens nec</sup>  
*virile cedere fortunæ, et imminentia adversa, quæ ferenda*  
*fortiter erant, subterfugere.* Et Megasthenes notabat ab <sup>Strab. xv. p. 718.</sup>  
 Indorum sapientibus reprehensum Calani factum, neque enim eorum placitis probari <sup>y</sup>talem exitum hominum ritæ impatiens

<sup>u</sup> *Passim receptum]* Athenis Æschines tempore ejus qui se interfecisset manus seorsim a corpore sepeliebatur. Æschines in Ctesiphontem, (pag. 309 E.) Addit Hegesippum Lib. III. cap. 17.

<sup>1</sup> Confer PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. II. c. 4. § 19. *J. B.*

<sup>x</sup> *Damnaverat]* Et Philosophorum non pauci extra Stoicos. Seneca epist. LXX. *Intenies etiam professos sapientiam, qui vim afferendam ritæ sua negent, et nefas judicent ipsum intercentorem sui fieri. Expectandum esse exitum quem natura decrevit.* Procopius Gotthicorum IV. *βίαιοις καταστροφή ἀχρηστοῖς καὶ ἄνοιᾳ προκετήσ, τὸ δὲ εἰς θά-*

*νατὸν θράσος, ἀνόγτον τοῦ τε δραστηρίου τρύσχημα οὐκ εὐπρεπὲς τοῖς γε σώφροις εἶναι δοκεῖ. καὶ τοι καὶ τοῦτο ἐκλογῆσθαι χρή, μή τι δόξῃ τε εἰς τὸ θεῖον ἀγνωμονεῖν, &c. Violentus ritæ exitus res inutilis et plena insipientis impetus, et illa in mortem ferens audacia, consilio cum careat, prudentibus judicatur immerito sibi fortitudinis nomen usurpare. Tum vero et illud cogitandum, ne in Deum sitis ingrati.* (*Hist. Miec. cap. 12.*)

<sup>y</sup> *Talem exitum hominum ritæ impatiens* <sup>z</sup> *Idem Arabibus visum, non minus quam Indis et Persis, ex Jobo discas III. 21.*

what is done to the dead deters the living.

2 The Platonists argued well, against the Stoics and others who thought that the need of a refuge from slavery and disease, and the hope of glory, were just causes of a voluntary death. They replied, that the soul must remain at its post in the body, and that we must not quit this life without His leave who placed us in it: as we find in Plotinus, Olympiodorus, Macrobius. On this ground, Brutus, at an earlier period, condemned the act of Cato, which he afterwards imitated. See Plutarch. And Megasthenes noted that the act of Calanus, [who burnt himself in the presence of Alexander and his army,] was blamed by the wise men of the Indians; for that their doctrine

*tium. Nec aliena Persarum, ut videtur, sententia, quorum rex Darius apud Curtium, *alieno scelere, quam meo mori malo.**

*Pag. 108 c.  
Tom. II.*

3 Ideo Hebræi mori vocabant ἀπολύεσθαι, id est, *dimitti*, ut videre est non tantum Luc. ii. 29 sed et in Græca versione, Gen. xv. 2, et Num. xx. in fine; quod genus loquendi et Græcis usitatum. Themistius de *Anima*: ἀπολύεσθαι τὸν ἀποθνήσκοντα, καὶ τὴν τελευτὴν ἀπόλυσιν καλοῦσιν εἰμι qui moritur aiunt *dimitti*, et mortem *dimissionem* vocant. Apud Plutarchum in consolatione legimus hoc sensu: ἐως ἣν ὁ Θεὸς αὐτὸς ἀπολύσῃ ἡμᾶς donec Deus ipse nos dimittat.

4 *\*Nonnulli tamen Hebreorum de lege se non interficiendi unam causam excipiunt, tanquam εὐλογον ἔξαγωγὴν, si quis videat se deinceps victurum in probrum ipsius Dei. Nam quis non nobis, sed Deo in vitam nostram jus esse statuunt,*

*Bell. Jud. II. (ut recte Josephus suos edocet) existimant præsumtam Dei*

*\* Nonnulli tamen Hebreorum] Variasse Hebraeorum super hac questione sententias cognoscas ex Josepho, ubi (De Bell. Jud. i. 2. p. 732,) de morte Phasselis et de deliberatione Herodis (Ant. Jud. xvii. 9. p. 599 b.) agitur. Judæi ad Petronium, Philone recitante: δυακερασθέντα τὸ ἰδιον αἷμα ἐπικατασφάξαντες ἑαυτούς. ἀποθανόντων τὸ ἐπίταγμα γενέσθω. Μέμψατ' ἀν οὐδὲ θεός ἡμᾶς, ἀμφοτέρων στοχαζομένους, καὶ τῆς πρὸς τὸν αὐτοκράτορα εὐλαβείας, καὶ τῆς πρὸς τοὺς καθωσιώμενους νόμους ἀποδοχῆς· γενίσεται δὲ τοῦτο, ἐὰν ὑπεκοστῶμεν εἵμιστον βίου καταφρονίσαντες· miscebimus inter nos sanguinem, morte sponte sumta: tum*

*mortuis ista imperentur. Ne Deus quidem nos culpet in duo intentios, ut et Imperator reverearim et sacras leges custodiamus. Id autem ita demum efficeretur dabatur, si abeamus hinc contenta vita minime vitali. (De Legat. ad Caium, pag. 1026 B. C.)*

*\* Ne tormentis adacti Christi religionem ejurarent] Vide Eusebium. (Hist. Eccl. Lib. viii. cap. 12.)*

*<sup>b</sup> Ne pudicitiam amitterent] Narrat Cicero nobilissimas virgines se in puto abjecisse, et morte voluntaria nefariam turpitudinem depulisse, oratione de provinciis consularibus, (cap. 3.) Tale est et quod de Mileais virginibus memorat Hieronymus aduersus Jovianum, (Lib.*

did not approve of such impatience of life. So Darius said, *I would rather die by another's crime than my own.*

3 Hence the Hebrews called death *dissolution* and *departure*, not only Luke ii. 29, but also in the Greek version of Gen. xv. 2, Num. xx. 29; which mode of speaking was also used by the Greeks. See Themistius, and Plutarch.

4 Some of the Hebrews make one exception to the rule against suicide, in a case of a *laudable retirement*, if any one foresees that he will in future live to the dishonour of God. For since God, not man, has a right to our lives, they think that the presumed will of God is the only thing which excuses the purpose of anticipating death.

voluntatem solam esse quæ mortis anticipandæ consilium absolvat. Atque huc referunt Samsonis exemplum, qui in suo corpore veram religionem videbat esse derisui, et Saulis, qui gladio incubuit, ne a Dei suisque hostibus illuderetur; nam hunc resipuisse volunt postquam Samuelis umbra mortem ipsi prædixerat, quam gnarus sibi imminere si pugnaret, prælium pro patria et Dei lege non detrectavit, æternam inde laudem meritus Davidis etiam præconio: a quo et ii qui Saulem cum honore sepelierant, recte facti testimonium retulerunt. Tertium est exemplum Razis Hierosolymitani senatoris in historia Maccabaica. Sed et in Christiana historia exempla legimus <sup>1 Sam. xxxi.</sup> <sup>2 Macc. xiv. 37.</sup> similia eorum, qui mortem sibi intulerunt, <sup>a</sup>ne tormentis adacti Christi religionem ejurarent, et virginum quæ <sup>b</sup>ne pudicitiam amitterent in flumen se jecerunt, quas et in martyrum censum Ecclesiæ retulit. Sed de his tamen <sup>c</sup>quid Augustinus sentiat videre est operæ pretium.

<sup>1.</sup> pag. 48. Tom. II. Ed. Basil.) et epigramma vetus *Anthologiae* Lib. III. 29. tit. *de Juvenibus*, incipiens ὡχόεθ' ὡ Μίλητε. Narrant et Judæi feminam in navi ad stuprum expetitam, cum a marito quæsiasset an et mari mersa corpora essent resurrecta, isque id affirmasset, jecisse se in mare. Christianarum autem mulierum plurima sane habemus exempla. Feminarum Antiochenarum sub Diocletiano: Sophroniæ sub Maxentio, in Martyrologiis, Zonara, (Lib. XII. cap. 33) Sexto Aurelio. Alias Antiochenas sub Chosroë addit Procopius *Persicorum* II. (cap. 8.) Laudat virgines, quæ morte pudorem servarant, Ambrosius (*de Virginib.* Lib. III. p. 97.

*Edit. Paris.* 1509.) Hieronymus in commentariis ad finem capituli primi Joannis: *Unde et in persecutionibus non licet mihi propria perire manu, absque eo ubi castitas periclitatur.* [Vide quo diximus in Libro Gallico *De doctrina Moralí Patrum Eccl.* cap. xv. § 7, et seqq. *J. B.*]

<sup>c</sup> *Quid Augustinus sentiat?* Cui addere licet Chrysostomum in Gal. I. 4. (Tom. III. pag. 714) et Concilium Arelianense III. *Oblationes defunctorum qui in aliquo crimine fuerint interemi, recipi debere censemus, si tamen non ipse sibi mortem probentur propriis manibus intulisee.* Et tamen is ipse Augustinus Lib. I. de Civitate Dei c. 16: *At per hoc*

Lib. I. de Civ.  
Dei. c. 26.  
Epist. 61. ad  
Dilec. d. il. 23.  
contr. sec.  
Gaud. epist.

To this they refer the examples of Samson and of Saul. The former saw that in his person the true religion was scorned. The latter was restored to a right way of thinking, after the shade of Samuel had predicted to him his death; and though knowing that this was at hand, he did not refuse to fight for God and his country; and fell on his sword to avoid the insults of the enemy: thus obtaining eternal praise, even from David. The third example is that of Razis, in the history of the Maccabees, 2 Macc. xiv. 37. In Christian history also, we read similar examples of persons who have killed themselves, lest under the pressure of torments they might renounce the Christian religion: and of virgins who have drowned

<sup>Diod. xvi. 25.</sup> 5 Alteram quoque exceptionem apud Græcos obtinuisse video, quam Locri opponebant Phocensibus, ὅτι παρὰ πᾶσι τοῖς Ἐλλησὶ κοινὸς νόμος ἐστιν ἀτάφους ρίπτεσθαι τοὺς ιεροσύλους<sup>a</sup> communem Græcis omnibus morem esse ut sacrilegi insepulti abhiciantur. Sic et Dion Prusæensis Rhodiaca τοὺς ἀσέβεις καὶ ἀνοσίους ait sepultura orbari. Idem Athenis <sup>b</sup>in proditores constitutum narrat Plutarchus Antiphonte. Sed, ut ad institutum me recipiam, ob negatam sepulturam bellum juste suscipi censuerunt veteres consensu magno: ut ex illa Thesei historia apparet, quam tractant Euripides dicta tragœdia *Supplicibus*, et Isocrates eo quem adduximus loco.

VI. Sunt et alia quædam quæ ex jure gentium voluntario debentur, ut longo tempore possessa, successiones ab intestato, et quæ ex contractu quantumvis inæquali veniunt. Nam hæc omnia quanquam ex jure naturæ ortum aliquatenus

et quæ se occiderunt ne quicquam hijusmodi patarentur, quis humanus affectus eis nollet ignosci? Capitulare autem Francicum libro VI. 70. *De eo qui semetipsum occidit aut laqueo se suspendit, consideratum est, ut si quis compatiens velit eleemosynam dare, tribuat, et orationes in psalmodiis faciat: oblationibus tamen et missis ipsi careant: quia incomprehensibilia sunt judicia Dei, et profunditatem consilii ejus nemo potest investigare.* Vide et ibidem VII. 344.

<sup>c</sup> *In proditores]* At Nicetas libro III. vita Alexii fratri Isaaci, (cap. 7) cum narrasset mortem Johannis Comneni Crassi, qui per seditionem imperium affectaverat, sic loquitur: μετὰ δὲ τὸ σῶμα ἐκεῖθεν ἀρθὲν, κυνὶ καὶ ὄρνιτος βορὰ παρατίθεται· δὲ καὶ θριάδες μικροῦ καὶ σπάνθρωπον ἔπασιν ἔδοκεν. Post corpus inde ablatum, canibus et avibus esca ponitur: quod ab humanitate alienum ac pæne ferinum omnibus videbatur.

themselves to save their chastity, and whom the Church places amongst its martyrs. But it is worth while to see what Augustine says of these cases.

5 I find that another exception obtained among the Greeks; which the Locrians objected to the Phocians: *It was the common usage of Greece that sacrilegious persons should be cast forth unburied.* So Dio Prusæensis. So traitors were treated at Athens, as Plutarch says.

But to return to my subject; the ancients were generally agreed in holding that war might justly be undertaken on account of sepulture denied; as appears by that history of Theseus which Euripides treats in the *Supplices*, and Isocrates in the Oration quoted.

VI. There are some other things which are due by the instituted Law of Nations; as possession by prescription, succession to intestates, and the results of contract, even if unequal. For all thes,

habeant, accipiunt tamen ex humana lege firmitatem quandam, sive adversus conjecturæ incerta, sive adversus exceptiones quasdam quas alioqui ratio naturalis videtur sugerere: ut supra obiter a nobis de jure naturæ agentibus ostensum est.

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although in a certain way they have their origin in Natural Law, yet received from human law a certain firmness, both against the uncertainty of conjecture, and against exceptions which otherwise natural reason seems to suggest: as we shewed above in passing.

## CAPUT XX.

### DE PŒNIS.

- I. *Pœnæ definitio et origo.*
- II. *Spectare pœnam ad justitiam expletricem, et quomodo.*
- III. *Pœnam certas personæ naturaliter non deberi, sed exigi pœnam licite, quoad jus naturæ, ab eo qui paria non deliquerit.*
- IV. *Pœnam utilitatis alicujus causa exigendam inter homines aliter quam apud Deum, et quare.*
- V. *Quo sensu ultio naturaliter sit illicita.*
- VI. *Utilitas pœnæ triplex.*
- VII. *Pœna ad utilitatem ejus qui deliquit: eamque a quolibet exigi naturaliter, cum distinctione tamen:*
- VIII. *Item ad utilitatem ejus in quem peccatum est; ubi de ultiōne licita jure gentium:*
- IX. *Item ad utilitatem quorumlibet.*
- X. *Quid lex Evangelica circa hanc materiam constituerit.*
- XI. *Solvitur argumentum sumptum a Dei misericordia in Evangelio patefacta:*
- XII. *Et a præcione pœnitentias.*
- XIII. *Rejiciuntur imperfectas divisiones pœnarum.*
- XIV. *Christianis privatis non esse tutum pœnam exigere, etiam ubi jure gentium id licet:*
- XV. *Aut sponte ad accusacionem prosilire:*
- XVI. *Aut judicia capitalia affectare.*
- XVII. *Leges humanæ quas interfectionem ad pœnam permittunt an jus dent, an impunitatem solam, distinctione explicatur.*
- XVIII. *Actus internos non esse punibiles inter homines:*
- XIX. *Nec actus externos quos fragilitas humana nequit vitare:*
- XX. *Nec actus quibus societas humana nec directe, nec indirecte loeditur: cuius rei causa redditur.*
- XXI. *Rejicitur sententia statuens ignoroscere nunquam licere.*
- XXII. *Ostenditur id licere anti legem pœnalem:*
- XXIII. *Non tamen semper:*
- XXIV. *Etiam post legem pœnalem.*
- XXV. *Quæ ad id faciendum probabiles cause intrinsecæ:*
- XXVI. *Quæ extrinsecæ.*
- XXVII. *Refellitur sententia statuens nullam esse justam causam dispensandi, nisi quæ per modum exceptionis tacite insit legi.*
- XXVIII. *Pœnas taxatio ex merito.*
- XXIX. *Spectari hic causas impellant, quas inter se comparantur.*
- XXX. *Item causas quas a peccando abstrahere debuerant: ubi de gradibus præceptorum decalogi, quæ proximum tangunt, et alia quedam.*
- XXXI. *Item aptitudinem peccantis ad utrumque, quæ varie spectatur.*
- XXXII. *Meritum pœnas extendi posse ad majus nocumen-*

- tum quam quod peccans intulit: et quare.*
- XXXIII.** *Rejicitur sententia de proportionis harmonica in poenam.*
- XXXIV.** *Minui paenam ex caritate nisi major caritas obstat.*
- XXXV.** *Facilitas peccandi quomodo ad paenam incitat: item consuetudo peccandi quomodo ad paenam incitat, aut ab ea retrahat.*
- XXXVI.** *Clementiae usus ad paenas minuendas.*
- XXXVII.** *Ad superiores locos referuntur quae Hebrei et Romani in paenam spectari volunt.*
- XXXVIII.** *De bello ad paenam.*
- XXXIX.** *An justum sit bellum ob delicta inchoata, distinctiones explicatur.*
- XL.** *An reges et populi bellum recte inferant ob ea quae contra jus naturae sunt, non tamen adversus ipsos ipsorum subditos, explicatur, rejecta sententia statuente naturaliter ad paenam exigendam requiri jurisdictionem.*
- XLI.** *Discernendum jus naturae a moribus civilibus late receptis:*
- XLII.** *Et a jure divino voluntario non omnibus cognito.*
- XLIII.** *In jure nature discernenda manifesta a non manifestis.*
- XLIV.** *An ob delicta in Deum bellum suscipi possit.*
- XLV.** *Notitia de Deo maxime communes quae, et quomodo primis decalogi preceptis indicentur.*
- XLVI.** *Qui has primi violent puniri posse.*
- XLVII.** *Non item alios, quod ostenditur argumento legis Hebreorum.*
- XLVIII.** *Bella juste non inferri iis, qui Christianam religionem amplecti nolunt:*
- XLIX.** *Juste inferri iis, qui Christians ob solam religionem crudeliter tractant:*
- L.** *Non etiam his, qui circa legis divinas interpretationem hallucinantur: quod auctoritatibus et exemplis illustratur.*
- LI.** *At illis juste, qui in Deos quos putant impii sunt.*

I. 1 **S**UPRA cum de causis ex quibus bella suscipiuntur agere coepimus, facta diximus dupli modo considerari, aut ut reparari possunt, aut ut puniri. Priorem partem jam absolvimus. Superest posterior quae est de poenis: quae res eo diligentius tractanda est nobis, quod origo ejus et na-

#### CHAPTER XX. *Of Punishments.*

I. 1 When above we began to speak of the causes for which wars are undertaken, we said that facts might be considered in two ways, either with a view to reparation, or to punishment. We have now finished the former part of the subject, and proceed to the latter, Punishment. And this must be the more carefully treated

tura minus intellecta multis errationibus causam dedit. <sup>1</sup> Est autem pœna generali significatu *Malum passionis, quod infligitur ob malum actionis.* Nam quanquam pro pœna quibusdam injungi opera quædam solent, ea tamen opera spectantur tantum quæ molesta sunt, atque ideo ad passiones sunt referenda. Quæ vero incommoda patiuntur aliqui ob morbum contagiosum, aut corpus mutilum, aut alias impuritates, quales multæ exstant in lege Hebræa, puta arceri cœtibus aut functionibus, proprie pœnæ non sunt, quanquam ob similitudinem quandam et per abusionem eo vocabulo appellantur.

2 Inter ea vero quæ natura ipsa dictat licita esse et non iniqua, est et hoc, ut qui male fecit malum ferat, quod antiquissimum et Rhadamantheum jus vocant philosophi, ut alibi diximus.

Pag. 601 n.

*Spectat eodem dictum Plutarchi libro de exilio: τῷ Θεῷ ἔπειται δίκη τῶν ἀπολιτομένων τοῦ θείου νόμου τιμωρὸς, ἢ χράμεθα πάντες ἀνθρώποι φύσει πρὸς πάντας ἀνθρώπους, ὡσπερ πολίτας· justitia Deum comitatur, ultrix in eos qui adversus legem divinam delinquunt: qua omnes homines natura utimur adversus omnes homines ut cives.*

In Euthyp.  
Tom. I. p.  
8 d.

<sup>2</sup> Plato dixit, ἐκεῖνο οὐδεὶς οὔτε θεῶν οὔτ' ἀνθρώπων τολμᾷ λέγειν ὡς οὐ τῷ γε ἀδικοῦντι δοτέον δίκην· nec Deorum nec hominum

<sup>1</sup> In toto isto capite perpetuo conserendum PUFENDORPIUS *De Jure Nat. et Gent.* Lib. VIII. c. 3. cum Notis nostris, præsertim alterius Editionis. *J. B.*

quidem, quemadmodum et vetus sermo est, initium et medietatem omnium quæ sunt habens, recte perficit, secundum naturam circumiens: hunc autem semper consequitur justitia ultrix in eos, qui deficitur a lege divina. (Cap. 41. vulg. 25. divis.

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by us, because its origin and nature, not well understood, have given rise to many errors.

Punishment, in its general signification, is *An Evil of suffering which is inflicted on account of (ob) an evil of doing.* For though labour [not pain] may be the sentence of persons as a punishment, yet such labour is considered as it is disagreeable, and therefore is a sort of suffering. But the inconveniences which some persons have to suffer on account of an infectious disease [Lev. xiii.], or a mutilation of the body [Deut. xxiii. 1], or other uncleanness [Lev. xv.]; such as, to be excluded from public assemblies, or from certain functions, are not properly punishments; although on account of a certain resemblance, and by an abuse of language, they may be called by that name.

2 Among the things which nature herself dictates as lawful and not unjust, this stands; that he who has done evil should suffer

*quisquam hoc dixerit, injuste agenti non luendam pœnam.*  
 Et Hierax justitiam ex parte hac tanquam nobilissima definiebat *τιμωρίας ἀπαίτησιν παρὰ τῶν προηδικητῶν, ρενεῖς exactionem ab iis qui priores læsere, et Hierocles ἰατρικὴν πονηρίας, malitiæ medicatricem.* <sup>Apud Stob. Serm. ix.</sup> <sup>b</sup> Lactantii dictum est : *Non exiguo falluntur errore, qui censuram sive humanam sive divinam acerbitatis et malitiæ nomine infamant, putantes nocentem dici oportere qui nocentes afficit pœna.*

3 Quod vero diximus pœnæ, quæ proprie ita nominatur, omnino hoc inesse ut delicto reddatur, notatum et Augustino est, qui dixit : *omnis pœna, si justa est, peccati pœna est :* <sup>1 Select. (sue Retract.) c. 9.</sup> quod ad pœnas etiam quæ a Deo irrogantur pertinet, quamquam in illis interdum ob humanam ignorantiam, ut idem scriptor loquitur, *latet culpa ubi non latet pœna.*

II. 1 Sed an ad assignatricem, an vero ad expletricem justitiam pœna pertineat, diversi versum sentiunt. Quidam enim quia qui plus peccavit, gravius, qui minus, levius puniuntur, et quia pœna quasi a toto partiatur, ideo ad assignatricem justitiam pœnas referunt.

Sed quod primum illi ponunt, assignatricem justitiam toties locum habere, quoties inter terminos plures duobus insti-

Massuet.)

<sup>b</sup> *Lactantii dictum est]* Convenit hoc et illud Belisarii apud Procopium Vandal. 1. *τρῶτον δ' ἀν τοῦ δικαίου γένοιτο γυάρισμα, ή τάν δίδικως ἀνηρη-* κότων τοινι· Primum justitiæ documentum erit, pœna exacta de injustis intersectoribus. (Cap. 12.) Adde Agathiam Lib. v. ubi de Anatolio. (Cap. 2.)

evil; which the philosophers call the ancient and Rhadamanthean law, as we have elsewhere said [I. II. 3.] So Plutarch, Plato. [See.] So Hierax defined justice by this as its noblest element; and Hierocles called it *the medicine of wickedness.* So Lactantius.

3 And this characteristic of Punishment, that it is the return for transgression, is noticed by Augustine; [see]; which belongs also to punishments inflicted by God; though in these sometimes it appears, through human ignorance, as he says, that *the transgression is hid while the punishment is apparent.*

II. 1 Whether Punishment belongs to attributive or to expletory justice there are different opinions. For inasmuch as those who transgress more gravely are more heavily punished, and those who sin less gravely, more lightly; and because punishment is assigned by the whole to a part, therefore they ascribe punishment to attributive justice.

But the principle on which they proceed, that attributive justice

tuitur æqualitas, verum non esse in principio operis hujus ostendimus: deinde quod magis nocentes gravius, minus nocentes levius puniuntur, id per consequentiam duntaxat evenit, non quod hoc primo ac per se spectetur. Nam primo ac per se spectatur æqualitas inter culpam et poenam: de qua

*I. Sat. iii. 78. Horatius:*

78.

Cur non

Ponderibus modulisque suis ratio utitur, ac res  
Ut quæque est ita suppliciis delicta coercent?

Et alibi (*Ibid. vers. 117, 118*):

Adsit

Regula peccatis quæ poenas irroget æquas,  
Nec scutica dignum horribili sectere flagello.

Eodem spectat lex divina Deuteron. xxv. et *Novella Leonis.*

vv. 2, 3.  
CV.

2 Sed nec alterum quod illi ponunt magis verum est, poenas omnes venire ex toto ad partem, quod ex his quæ dicenda sunt apparebit. Tum vero ostensum a nobis supra est, veram justitiae assignataricis rationem nec in tali æqualitate, nec in

[Æ]qualitas inter culpam et penam]  
Seneca de Ira ii. 6. Iniquus erit si  
æqualiter irascetur inæqualibus. Tacitus Annalium iii. (cap. 50.) Sin flagitia  
et facinora sine modo sunt, supplicia  
et remedii principis moderatio, majo-  
rumque et vestra exempla temperant, et  
vana a scelestis, dicta a maleficiis diffe-  
runt: est locus sententie, per quam  
neque huic delictum impune sit, et nos  
clementiae simul ac severitatis non pauci-  
teat. Ammianus libro xxviii. c. 1.

Oratur ne delictis supplicia sint gran-  
diora. Scholiastes ad Horatium, (init.  
*Sat. iii. Lib. i.*) Si in minimis peccatis  
etiam maximæ pœna consumuntur, restat  
ut maxima peccata aut maneant impu-  
nita, aut nova supplicia adinveniantur.  
Lex Wisigothorum libro xii. tit. iii.  
cap. 1. Nam quadam leges sicut cul-  
parum habent diversitates, non ita dis-  
cretas in se continent (retinent) ultiones,  
sed permixta scelera transgressorum  
ad unius permittuntur legis pœnale judi-

obtains wherever an equality is introduced between more than two terms, we have proved, in the beginning of this work, not to be true [I. i. 8]. And in the next place, that greater offenders are punished more severely, smaller ones more lightly, that only happens by consequence, and is not what is looked to in the first place and *per se*. For the thing first looked at is the equality between the offense and the punishment, as Horace says. [See.] And in like manner Deut. xxv. 2, 3; and the *Novella* of Leo.

2 Nor is their other principle more true, that all punishments come from the whole to a part, as will appear by what we have hereafter to say. But further: it is shewn above that the true notion of attributive justice does not properly consist, either in such equality, or in the process from the whole to a part; but in taking account of that claim which does not include right strictly taken, but gives occa-

processu a toto ad partem proprie consistere, sed in habenda ratione ejus aptitudinis, quæ jus stricte dictum in se non contineat, sed occasionem ei det. Quanquam vero is qui punitur aptus aut dignus esse debet puniri, non eo tamen id spectat ut ipsi accedat aliquid, quod assignatrix justitia postulat. Nec tamen qui expletricem justitiam, quam vulgo commutatricem vocant, in p̄enis exerceri volunt, magis se explicant. Ita enim negotium hoc considerant, quasi nocenti aliquid reddatur, sicut in contractibus fieri solet. Decepit eos vulgaris locutio, qua dicimus p̄enam deberi ei qui deliquit, quod plane est ἀκυρον: nam cui proprie debetur aliquid, is in alterum jus habet. Sed cum deberi alicui p̄enam dicimus, nihil volumus aliud quam æquum esse ut puniatur.

3 Verum tamen est in p̄enis primo ac per se exerceri expletricem justitiam, quia scilicet qui punit, ut recte puniat, jus habere debet ad puniendum, quod jus ex delicto nocentis nascitur. Atque hac in re est aliud <sup>d</sup> quod ad contractuum na-

cium. *Nec secundum modum culpe modus est adhibitus p̄ene, cum major minorque transgressio non unius debeat multationis prædamnari suppicio: presertim cum dominus in lege sua præcipiat: pro mensura peccati, erit et plagarum modus.* Vide infra hoc capite, § xxviii. et xxxii. et Lib. III. c. xi. §. [In loco TACITI legendum mihi videatur: *Sin flagitia et facinora, etsi sine modo sunt &c. alias non constat sensus,* quem nec Freinsheimius in paraphrasi,

nec alii interpres, satis expedient: et facile a Librariis omitti potuit particula etsi, propter sequentem *sine.* Qua de re judicium penes Criticos esto. J. B.]

<sup>d</sup> *Quod ad contractuum naturam accedit]* Sæpe hoc notat Servius, ad iv. Æneidos, (vers. 695) *nam qui excedunt delinquendi modum, ipsi sibi p̄enam sanciunt.* Ibidem (in vers. 699) *damnare est debito liberare, unde DAMNABIS TU QUOQUE VOTIS.* Ad x. Æneidos, (vers. 32) *LUANT PECCATA: luant, id est,*

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sion to it. And although he who is punished ought to have a moral claim, or to be worthy, to be punished, still that does not go to prove that he has such a quality as attributive justice requires.

But neither do they who hold that expletory, or, as it is commonly called, commutatory justice, is exercised in Punishment, explain themselves better. For they regard the transaction as if something were paid to the offender, as is commonly done in contracts. They are deceived by the vulgar expression in which we say that Punishment is the *due* of him who has transgressed; which is plainly an improper expression, for he to whom anything is properly a due, has a right over another. But when we say that punishment is any one's due, we mean nothing else than that it is just that he should be punished.

3 Still, however, it is true, that in punishment the justice which is exercised is in the first place and *per se* expletory justice: because he

turam accedit : quia sicut qui vendit, etiamsi nihil peculiariter dicat, obligasse se censetur ad ea omnia quæ venditionis sunt naturalia, ita qui deliquit sua voluntate se videtur obligasse pœnæ, quia crimen grave non potest non esse punibile, ita ut qui directe vult peccare, per consequentiam et pœnam mereri voluerit : quo sensu Imperatores cuidam aiunt, *ipse te huic pœnæ subdidisti*, et qui sceleratum capiunt consilium sua mente <sup>2</sup>jam tum puniti, id est, sua voluntate pœnæ meritum contraxisse dicuntur : et Tacito mulier quæ se servo conjunxisset in servitutem sui <sup>3</sup>consensisse dicitur, quia id pœnæ in tales erat constitutum.

*L. Imperat.  
34. D. de Jur.  
jusc.  
L. ult. C. ad  
l. Jul. Maj.*

*Ann. XII. 53.*

*Cap. 2.*

4 Michaël Ephesius ad quintum Nicomachiorum Aristoteles : γέγονε τρόπον τινὰ δόσις καὶ λῆψις, ὁ ἔστι τὸ συναλλάσσειν λαβὼν γὰρ χρήματα η̄ ἄλλο τι κλέψας, δέδωκεν ἀντ' ἔκεινων εὐθύνας· est hic quodammodo datio et acceptio, in quibus consistit natura contractuum : nam qui res aut

absolvant. Dicimus autem et tuo pœnam : sed melius est hic peccatum : nam peccatum solvit pena : qui enim criminis tenetur obnoxius, pœna eum a prætina liberat obligatione : Contra, tuo pœnam, non procedit, quasi pœna solvatur. Auctoritas tamen ista confundit licenter, more quo solet ponit vel a sequenti quod præcedit, vel a prædenti quod sequitur. Idem locutio sacræ scripturæ frequens indicat. Nam, ut Tertullianus ait de Oratione, (cap. 7) Debitum in scripturis delicti figura est, quod perinde judicio debeatur, et ab eo exigatur. Chrysostomus oratione de

terræ motu, quæ est tomo v. (Immo Tom. vi. pag. 677. Edit. Savil.) de divite illo agens qui Lazaro opponitur, et explicans vocem ἀπέλαθες, quæ est in illo Evangelii loco, (Lucæ xvi. 25) ἐχρεωστοῦτο αὐτῷ τιμωρίας, ἐχρεωστοῦντο αὐτῷ δόναις· debebantur ipse pœna, debebantur ipse dolores. Idem ii. de Pœnitentia : τὰ ἀμαρτήματα εἰς ὀφειλήματα ἀναγράφεται· peccata ad debiti genus referuntur. [Ibi est, ᾧ ὀφειλήματα &c. Tom. vi. pag. 771.] Augustinus iii. de libero Arbitrio : Itaque si non reddit faciendo justitiam, reddit patiendo miseriam : quia in utroque verbum

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who punishes, in order to punish rightly, ought to have a right to punish, which right arises from the delinquency of the offender. And in this matter, there is another thing which approaches to the nature of contracts ; that as he who sells, although he say nothing particularly, is conceived to have obliged himself to all the things which are natural to selling ; so he who has wilfully offended, seems to have obliged himself to undergo punishment ; because grave crime cannot be otherwise than punishable : so that he who directly wills to offend, must also by consequence have willed to incur punishment. And in this sense, the emperors say to such a person, *You have subjected yourself to this punishment* ; as those who take wicked counsels are said to have already incurred punishment in their own thoughts : and in Tacitus, a woman who had joined herself to a slave is said to have consented

*aliud quid furatus est, pro eo dat pænas.* Idem posterius: Ad Cap. 4.

*συναλλάγματα οἱ παλαιοὶ ἐκάλουν οὐ μόνον ἢ ἐκόντες συνετίθεντο πρὸς ἀλλήλους ποιεῖν, ἀλλὰ καὶ τὰ ὑπὸ τῶν νόμων διηγορευμένα· contractus a veteribus appellabantur non tantum quæ mutuis conventionibus constant, sed et quæ legibus sunt vetita.*

III. 1 Sed hujus juris subjectum, id est, cui jus debetur, per naturam ipsam determinatum non est. Dictat enim ratio maleficium posse puniri, non autem quis punire debeat: nisi quod satis indicat natura convenientissimum esse ut id fiat ab eo qui superior est: non tamen et omnino hoc demonstret esse necessarium, nisi vox superioris eo sumatur sensu, ut is qui male egit eo ipso se quovis alio inferiorem censeatur fecisse, et quasi ex hominum censu detrusisse <sup>in</sup> censem bestiarum quæ homini subjacent, quod a theologis quibusdam est proditum. Democritus: *φύσει τὸ ἄρχειν οἰκῆιον τῷ κρείσσονι,*

*illud debiti sonat. Hoc enim etiam modo dici potuit, quod dictum est: si non reddit faciendo quod debet, reddet patiendo quod debet.* (Cap. 15. § 44. Ed. Benedictin.)

<sup>c</sup> *Ipse te huic pæna subdidisti]* Philo fine libri primi de Vita Mosis; *αὐτοὶ γάρ τοι σπειδούστε αἱματάνειν, σπεύστε καὶ πρὸς τιμωρίας· peccare dum festinatis, ad pænas ferendas festinatis.* (Pag. 652 n.)

<sup>2</sup> In omnibus Editionibus erat hec *suo merito*: sed contra lectionem omnium corporis Juris Codicum, quos quidem viderim, et præter mentem etiam

Auctoris nostri, qui, dum exponit *sua voluntate*, manifesto ostendit, se leguisse *sua mente*: quamquam ipse erratum non animadverterit, etiam quum in Editione ann. 1632: adderet voces sequentes *jam tum*, quæ in prima Editione desunt. J. B.

<sup>3</sup> Apud TACITUM legendum omnino, ut edidit RYCQUIUS: *Statuiturque, ut ignaro domino ad id prolapsa, in servitate: sin consensisset, pro liberta haberetur.* Vide ibi J. Fr. GRONOV. Notam. Sic locus nil ad rem facit. J. B.

<sup>1</sup> *In censem bestiarum]* Sic et Moses Maimonides ad Deut. xxxiii.

Thom. 2. 2.  
quest. 61.  
art. 9. et ibi  
Cajet.  
Apud Stob.  
Serm. 47.

to her own slavery, because that was the punishment for such persons\*.

4 Michael Ephesius on Aristotle illustrates this.

III. 1 Of such punishment, the subject, that is, the person *to whom* it is due, is not determined by nature itself. Nature dictates that evildoing may be punished, but not who ought to punish: except that nature sufficiently indicates that it is most suitable that it be done by one who is superior: yet not in such way as to shew that this is necessary; except the word *superior* be taken in this sense, that he who has done wrong has, by that very fact, made himself inferior to any other, and has thrust himself out of the class of men into that of the inferior brutes, as some theologians hold. See Democritus, Aristotle.

\* Tacit. Annal. xii. 53. The passage, rightly used, is nothing to the purpose, as Barbeyrac remarks.

כל פעל יהוה למענהו כה Solomonis quod ad hanc materiam pertinet: ut sensus sit, *res singulas Deus facit propter ipsas, etiam impium ad diem malum*: id est, etiam tum cum impium punit, non alio fine hoc facit quam ut puniat. Quamquam, etiamsi receptionem sequamur interpretationem, eodem res recidet; ut dicatur Deus fecisse omnia propter se, id est, jure summae libertatis et perfectionis, nihil extra se quærens aut respiciens: sicut Deus dicitur αὐτοφυῆς, quia non est natus ex aliquo. Certe pœnas quorundam valde perditorum a Deo non ob aliud exigi sacra verba testantur, cum dicunt eum voluptatem capere ex ipsorum malo, subsanari atque irrideri impios a Deo. Tum vero et extremum iudicium, post quod nulla exspectatur emendatio, imo et in hac vita pœnae quædam inconspicuae ut obduratio, verum esse, quod contra Platonem dicimus, evincunt.

*Deut. xxviii.  
63.  
Isai. i. 24.  
Prov. i. 26.*

3 At homo cum hominem sibi natura parem punit, aliquid sibi debet habere propositum. Et hoc est quod aiunt scholastici, non debere in malo cuiusquam acquiescere ulciscentis animum. Sed et ante ipsos Plato in *Gorgia*, eos qui quemquam morte puniunt, aut exilio, aut multa, non hoc βούλεσθαι

*Thom. 2. 2.  
quest. 108.  
Ethic. Verd.  
Vind.  
Pag. 468 n.*

<sup>1</sup> *Seneca*] Ejusdem est libro eodem de *Ira* secundo, capite xii. *Exsequar, quia oportet, non quia dolet.* [Immo Lib. I.]

<sup>2</sup> *Quam homo cum bestiis habet communem*] Inde ista Homerica (*Iliad.* iv. 28) χόλος δέ μιν ἄγριος ἦπει· illum fera

prenderat ira. Item (*Iliad.* ix. 625): Άγριος ἐν στρίβεσσοι θέτο μηραλήπτα θυμόν. Efferat ipse animum magnum sibi pectore in alto.

Item (*Ibid.* vers. 492):

Ἄλλ' Αχιλεὺς δάμασον θυμὸν μέγαν. Magnum animum sed Achille doma.

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*all things for himself; yea, even the wicked for the day of evil.* But even if we take the more common interpretation, it comes to the same thing: that God has done all things by the right of his supreme liberty and perfection, seeking and requiring nothing beyond himself; as he is said to be self-existent. Certainly the words of Scripture testify, that the punishments of very wicked men are inflicted on this account, when they speak (*Deut. xxviii. 63*) of God's *rejoicing over them to destroy them*: of his mocking and laughing at them (*Prov. i. 26.* *Isai. i. 24*). And that what we have said against Plato is true, is proved by the last judgment, after which no amendment is to be expected: as also by the infliction of some inconspicuous punishment, as the hardening of the sinner's heart, in this life.

3 But man, when he punishes a being of the same nature as himself, ought to have some object in view. And this is what the Schoolmen say, that the mind of him who inflicts punishment ought not to

*ἀπλῶς, simpliciter velle, sed boni alicuius causa, ἐνεκα τοῦ ἀγαθοῦ.* Et <sup>1</sup>Seneca ad vindictam veniendum non quasi *dulce sit vindicare, sed quasi utile.* Etiam Aristoteles septimi de republica capite XIII. ait, quædam esse honesta simpliciter, quædam ob aliquam necessitatē: et posterioris exemplum ponit in pœnarum exactione.

V. 1 Quod ergo a mimo dictum est:

Publ. Syr.  
v. 340.

Læso doloris remedium inimici dolor:

et a Cicerone, dolorem pœna mitigari, Plutarch ex Simonide; <sup>Orat. pro  
Cæcili. c. 12.  
Vt. Arat.  
p. 1048 s.</sup> Γλυκὺ καὶ οὐ σκληρὸν ὥσπερ ἀλγοῦντι τῷ θυμῷ καὶ φλεγ-  
μαίνοντι θεραπείαν καὶ ἀναπλήρωσιν προσφέρειν: congruit  
quidem ei naturæ <sup>k</sup>quam homo cum bestiis habet communem: est enim ira ut in bestiis ita in homine ζέσις περικαρδίου  
ἀλματος δι' ὄρεξιν ἀντιλυπήσεως, ut recte definit Eustratius,  
<sup>1</sup>fervor sanguinis circa cor ob appetitum reponendi doloris, <sup>In Eust.</sup> Nic. vi. i.  
qui appetitus adeo per se caret ratione, ut sæpe feratur in ea,  
quæ non læserunt, ut in fœtus feræ quæ læsit; <sup>m</sup>aut in sensu  
carentia, ut in lapidem quo ictus est canis. At talis appetitus  
in se spectatus <sup>n</sup>non convenit parti rationali, cuius est imperare affectibus; ac proinde nec juri naturæ, quia id est dicta-

<sup>1</sup> *Fervor]* Inde σβέσσαι χόλον, bitem extingueret, apud Homerum [*Iliad.* ix. 674.]

<sup>m</sup> *Aut in sensu carentia]* Seneca de *Ira*, libro II. c. 26. *His irasci quam stultum est, quæ iram nostram nec meruerunt nec sentiunt.* Brasiliani, feri

homines, de ferro, ita ut de homine se vindicant. [Vide JOANN. LERICM, *Itin. Brasil.* p. 163.]

<sup>n</sup> *Non convenit parti rationali, cuius est imperare affectibus]* Vide quæ in hanc rem Seneca de *Ira* libro I. c. 5.

rest in the evil inflicted on any one. Plato had said the same before. [See.] And Seneca; so also Aristotle.

V. 1 Therefore what has been said by various writers, that the pain of the offender is a remedy of the pain of the injured person, (Publius Syrus, Plutarch, Cicero,) does indeed agree with the nature which man has in common with brutes; for anger is, in brutes as in man, a heat of the blood arising from the desire of revenge, which appetite is irrational; so that it is often directed against objects which have done them no harm, as against the offspring of the creature which did the harm, or against things which have no sense, as in a dog against the stone which hit him. But such an appetite, considered in itself, does not correspond to our rational part, of which the office is to control the passions; and consequently, not to Natural Law, because that is the dictate of our rational and social nature as such. But reason dictates to man that nothing is to be done by him so as to

tum naturæ rationalis ac socialis qua talis est. Dictat autem ratio homini nihil agendum quo noceatur homini alteri, nisi id bonum aliquod habeat propositum. In solo autem inimici dolore, ita nude spectato, nullum est bonum nisi falsum et imaginarium: ut in divitiis supervacuis, multisque aliis rebus ejusmodi.

2 Atque hoc sensu ultionem improbant in hominibus non Christiani modo doctores, <sup>o</sup> sed et philosophi, ut Seneca: *In-humanum verbum est et quidem pro justo receptum ultio, et a contumelia non differt nisi ordine.* Qui dolorem regerit, tantum excusatius peccat. Imo, si Maximo Tyrio credimus, ο τιμωρῶν τοῦ προϋπάρχαντος ἀδικάτερος, iniquior est qui se ulciscitur eo qui prior nocuit. Musonius, id, ait, cogitare quomodo quis remordeat mordentem, et nocenti noceat, ferœ est, non hominis. Apud Plutarchum Dion is qui sapientiam Platonicam in actus civiles convertit: τὸ ἀντιτιμωρεῖσθαι τοῦ προαδικεῖν νόμῳ δικαιότερον ὥρισθαι, φύσει γινόμενον ἀπὸ μᾶς ἀσθενειας: ultionem legis arbitrio justiorem censeri illata injuria: at si natura spectetur ex eodem animi morbo nasci.

3 Pugnat ergo cum natura hominis in hominem agentis alieno dolore, qua dolor est, satiari. Atque adeo quo hominum quisque minus valet rationis usu, eo ad vindictam est pronior. Juvenalis (*Sat.* xiii. 180, et seqq.):

At vindicta bonum vita jucundius ipsa.

¶ Nempe hoc indocti, quorum precordia nullis

<sup>o</sup> Sed et Philosophi] Plato *Gorgia*.  
Vide de eo Theodoretum, libro xx. curationis.

¶ Nempe hoc indocti] Seneca *de Ira* 1. 13. *At qui iracundissimi infantes senesque et aegri sunt, et invalidum omne natura querulum est.*

¶ Nemo magis gaudet quam femina]

Terentius *Hecyra* (iii. i. 30):

Pueri inter seco quam pro levibus noctis iras gerunt.

Quapropter? quia enim qui eos gubernat animus, infirmum gerunt.

Itidem mulieres sunt ferme, ut pueri, leviter sententia.

Ammianus Marcellinus libro xxvii.

harm another man, except it have some good purpose. But in the pain of an enemy, so nakedly regarded, there is no good, but a false and imaginary one; as in superfluous riches, and many other things of that kind.

2 And in this sense revenge is condemned, not only by Christian doctors, but also by heathen philosophers. So Seneca, Maximus Tyrius, Musonius. In Plutarch, Dio, who converted the Platonic wisdom into acts, says that vengeance proceeds from the same disease of the soul as injurious aggression. [See.]

LIB. II. de  
Ira, c. 32.

Diss. ii. p.  
24, 25.

Apud Stob.  
Serm. 19.

Vit. Dion.  
p. 979 A.

Interdum aut levibus vides flagrantia causis:  
 Quantulacunque adeo est occasio, sufficit ira.  
 Chrysippus non dicet idem, nec mite Thaletis  
 Ingenium, dulcique senex vicinus Hymetto,  
 Qui partem acceptæ sœva inter vincla cicutæ  
 Accusatori nollet dare. Plurima felix  
 Paulatim vitia atque errores exuit omnes,  
 Prima docet rectum sapientia: quippe minuti  
 Semper et infirmi est animi exiguae voluptas  
 Ultio: continuo sic collige, quod vindicta  
<sup>q</sup>Nemo magis gaudet quam femina.

Eodem sensu Lactantius: *imperiti et insipientes siquando accipiunt injuriam cæco et irrationabili furore ducuntur, et iis qui sibi nocent vicem retribuere conantur.*

4 Liquet ergo ab homine hominem non recte puniri tantum puniendi causa: quæ ergo utilitates rectam faciant pœnam videamus.

VI. 1 Pertinet autem hic pœnarum partitio, quæ est apud Platonem Gorgia, et Taurum philosophum ad eum locum cuius verba Gellius recitat libro vi. cap. xiv. nam partitiones istæ ex fine desumptæ sunt, nisi quod cum duos fines Plato posuissebat, emendationem et exemplum, tertium addidit Taurus <sup>τιμωρίαν</sup>, quam Clemens Alexandrinus definit, κακοῦ ἀνταπόδοσιν εἰς τὸ τοῦ τιμωροῦντος συμφέρον ἀναφερομένην mali retributionem quæ ad exigentis utilitatem refertur. Aristoteles, qui omissa pœna exemplari, hanc solum speciem cum emendatione ponit, adhiberi eam dicit, τοῦ ποιοῦντος <sup>Rhet. 1. 10.</sup>

*de Ira* sic loquitur: *hanc esse ulcus animi diuturnum, interdumque perpetuum, prudentes definiunt, nasci ex mentis molitiae consuetum, id assertentes argumento probabili, quod iracundiores sunt incolumibus languidi, et feminæ mari-*

*nosi. (Cap. 7. pag. 536. Ed. Vales. Gron.)*

<sup>r</sup> *Τιμωρίαν*] Tria hæc, νονθεσταν, τιμωρίαν, κόλασιν, emendationem, satisfactionem, exemplum, etiam Chrysostomus ponit in 1 ad Corinth. xi. 32. (Tom. III. pag. 424, 425. Ed. Savil.)

3 It is therefore contrary to the true nature of man acting on man, to find satisfaction in the pain of another person, as pain. See Juvenal on Revenge. [Sat. XIII. 180.] So Lactantius.

4 Therefore man is not rightly punished by man merely for the sake of punishing: let us see then what utility makes punishment right.

VI. 1 To this subject pertains the division of punishment stated in Plato's *Gorgias*, and Taurus on the place, as quoted by Gellius: which division is taken from the end of punishment; except that while

Ethic. Nic. v.  
7, 8.

ένεκα ἵνα ἀποπληρωθῇ, *exigentis causa ut ei satisfiat.* Plutarchus quoque eam non omisit, cum dixit: *ai ὑπὸ χείρα τοῖς τολμωμένοις ἀπαντώσαι τιμωρίαι καὶ τῶν μελλόντων εἰσὶν ἐπισχέσεις ἀδικημάτων, καὶ μάλιστα τὸ παρηγοροῦν τοὺς πεπονθότας ἔνεστιν αὐταῖς· que facinus statim subsequuntur pœna, non modo in posterum inhibent delinquendi audaciam, sed et injuria affectos maxime consolantur.* Et

*hæc proprie est quam idem Aristoteles refert ad δικαιοσύνην συναλλακτικὴν, justitiam quam ipse commutatricem vocat.*

2 Sed subtilius ista examinanda sunt. Dicemus ergo, in pœnis respici aut utilitatem ejus qui peccarit, aut ejus cuius intererat non peccatum esse, aut indistincte quorumlibet.

VII. 1 Ad horum trium finium primum pertinet pœna, quæ philosophis modo *νοῦθεσία*, modo *κόλασις*, modo *παραίνεσις* dicitur, Paulo Jurisconsulto pœna quæ constituitur in emendationem, *σωφρονισμὸν ἔνεκα* Platoni, Plutarcho *ἰατρείᾳ ψυχῆς, animi medicatrix*, quæ hoc agit ut eum qui peccavit reddat meliorem medendi modo, qui est per contraria. Nam quia omnis actio, præsertim vero deliberata ac frequens, quandam gignit sui proclivitatem, quæ adulta habitus dicitur, ideo vitiis, quamprimum fieri potest, adimenda est illecebra, quod fieri rectius nequit, quam si <sup>\*</sup>dolore quodam sub sequente saporem amittant dulcedinis. Platonici recitante Apuleio: *gravius et acerbius est omni supplicio si noxio impunitas differatur, nec hominum interim animadversione plectatur.* Apud Tacitum est: *corruptus simul et corruptor æger et flagrans ani-*

I. 20. D. De  
Pœn.  
De Leg. xl.  
p. 933 n.  
De sera  
Num. vind.  
p. 550 A.  
839 r.

De Habit.  
doct. Platon.  
p. 21.

Ann. III. 54.

\* *Dolore quodam sub sequente] Seneca et adactis cuneis, non ut frangamus, sed de Ira 1. 5. quemadmodum quædam hostiæ detorta, ut corrigamus, adurimus, ut explicemus, elidimus: sic ingentia vicia prava dolore corporis animique*

Plato mentions two ends, *amendment* and *example*, Taurus adds a third, *retribution*. So Clemens Alexandrinus. Aristotle takes the two latter ends. Plutarch recognizes retribution. And this is properly what Aristotle refers to *synallactic justice*.

2 But this must be more minutely examined. We shall say then that in punishment is regarded either the utility of the offender, or of him who suffers by the offense, or of persons in general.

VII. 1 To the first of these ends, pertains punishment which is called reformatory: of which Paulus, Plutarch, and Plato speak; the object of which is to make a better man of the offender. For as repeated acts beget habits, vices are to be cured by taking away the pleasure which they bring, and putting pain for their sweetness. So

*mus haud levioribus remediis restinguendus est, quam libidinibus ardescit.*

2 Punitionem quæ huic fini inservit natura cuivis esse licitam, qui judicio valeat, et ejusmodi generis aut paribus vi- <sup>Thom. 2. 2.  
quest. 33. 3.</sup> tiis non teneatur, ex ea quæ verbis fit castigatione apparent.

Amicum castigare ob meritam noxiā,  
Immune est facinus, verum in æstate utile.

*Plaut. Trin.  
l. 1. 1.*

In verberibus vero et aliis quæ coactionis aliquid continent, discriminem <sup>‘inter personas quibus id liceat aut non liceat non</sup> est factum a natura (neque enim potuit, nisi quod ratio parentibus in liberos ejus usurpationem pro affectus necessitudine peculiariter commendat) sed a legibus, quæ communem illam generis humani propinquitatem, vitandarum rixarum ergo, ad proximos affectus restrinxerunt, ut videre est tum alibi, tum Codice Justinianeo, titulo de emendatione propinquorum: quo et illud pertinet Xenophontis ad milites: *εἰ μὲν ἐπ’ ἀγαθῷ ἐκόλαστα τινὰ, ὅξιῶ ὑπέχειν δίκην, οἱαν καὶ γυναικίς νιοῖς καὶ διδάσκαλοι παισί· καὶ γὰρ ιατροὶ τέμνουσι καὶ καίουσιν ἐπ’ ἀγαθῷ· si quem ut podessem verberavi, paenam debere me profiteor, qualem parentes filiis, et magistri discipulis. Nam et medici aegrotum suo ipsius bono urunt ac secant.* Lactantius libro vi: *Jubet Deus ut manus nostras* <sup>Cap. 12. n. 8.</sup> *super minores semper habeamus, hoc est, ut peccantes eos assiduis verberibus corrigamus, ne amore inutili et indulgentia nimia eduentur ad malum et ad vitia nutriantur.*

*corrigimus. Idem de Ira 11. 27. In his erunt boni magistratus, parentesque, et judices, quorum castigatio sic accipienda est, quomodo scalpellum, et absti-*

*nentia, et alia quæ profutura torquent.*  
*[Inter personas quibus id liceat]*  
*Vide Augustinum Enchiridio cap. 72.*

Plato and Tacitus.

2 That punishment which answers such an end, is lawful to every one of sound judgment, who is not implicated in that or the like vices, appears from what is said of verbal castigation. It is *an unofficial Duty.* [See Plautus.] In stripes and inflictions, which contain anything of compulsion, the difference between the persons to whom it is, and to whom it is not lawful, is not made by nature, (nor could be, except that nature commends to parents the office of correcting their children,) but by the laws, which, for the sake of avoiding quarrels, have restricted that general relation [of correctors and corrected] to the nearest family relatives, as we may see in the Codex of Justinian, Title *De emendatione propinquorum.* So also in Xenophon, Lactantius.

3 Hoc vero puniendi genus ad mortem pertingere non potest, nisi eo modo quem reductivum vocant, quo negationes reducuntur ad rerum oppositarum genera. Nam sicut Christus *Marc. xiv. 21.* dixit melius quibusdam futurum fuisse, id est, non tam male, si nati nunquam essent, ita ingenii insanabilibus melius est, id est, minus est malum emori quam vivere, quando certum est vivendo peores evasuros. De talibus Seneca loquitur, cum ait, interdum ut pereant interesse pereuntium. Jambli-  
*De Ira, l. 5.*  
*Vid. et c. 16.*  
*Protr. c. 2.*  
*De sera num. vind. p.*  
*551 II.*  
*chus: καθάπερ τῷ ὑποπύφ βέλτιον τὸ καίσθαι τοῦ διαμένειν, οὗτο καὶ τῷ μοχθηρῷ τὸ τεθνάναι τοῦ ζῆν γνωμόδῳ suppurato melius est uri quam sic manere, ita improbo mori quam vivere.* Talem vocat Plutarchus ἐτέροις γε πάντως βλαβερόν, αὐτῷ τε βλαβερώτατον, ceteris noxiū guidem, at sibi maxime. Et Galenus cum morte puniri homines dixisset, primum ne vivi noceant, deinde ut alii pœnas metu deterreantur, addit: καὶ τρίτον ἔστι καὶ αὐτοῖς ἐκείνοις ἀμεινον τεθνάναι, διεφθαρμένοις οὕτω τὴν ψυχὴν ὡς ἀνίατον ἔχειν τὴν κακίαν τρίτον et ipsis expedit mori ita corruptis animo ut ad sanitatem perduci nequeant.

1 Joh. v. 16. 4 Sunt qui hos ipsos esse putant quos Johannes Apostolus

\* *Ad mortem peccare]* Τοὺς δύιατα νοσοῦντας: morbo tentos insanabili hos vocat Chrysostomus 2 Corinth. xiii. 9. (Tom. vi. pag. 702.) Julianus secundo libro de Constantio: διττῶν δὲ δύτων τῶν ἀμαρτηριῶν καὶ τῶν μὲν ἀποφαι-

νόντων δὲ πίδας ἀμείνους, καὶ οὐ πάντη τὴν θεραπείαν ἀπεστραμμένων, τῶν δὲ δύιατα πλημμελούντων τούτοις δὲ οἱ νόμοι θάνατον λύσιν τῶν κακῶν ἀπενόστας, οὐκ εἰς τὴν ἐκείνων μᾶλλον, εἰς δὲ τὴν τῶν δὲλλων ὥφελειαν εἰπεν διο-

3 But this kind of punishment cannot extend as far as death, except in what they call a reductive way, in which negations are reduced to the opposite class. For as Christ said, it would have been better for some if they had never been born, that is not so ill: so for incurable dispositions, it is better, that is less evil, to die than to live, since by living they are sure to become worse. Seneca says they must perish, in order that they may not perish. So Jamblichus, Plutarch, Galen.

4 Some think that these are those whom St John speaks of as sinning unto death. But this is doubtful, and charity requires that we should not lightly hold any one's condition for desperate; and so we must rarely punish in such a view.

VIII. 1 The utility of him whose interest it was that the fault should not have been committed, consists in this, that he do not in future suffer anything of the same kind from the same person or from others. Gellius, from Taurus, says of this case: *When the dignity*

ait "ad mortem peccare. Sed quia fallacia sunt ejus rei argumenta, dictat caritas neminem temere habendum pro deplo-  
rato, ita ut hoc quidem fine animadversio, non nisi raro admo-  
dum, locum habere possit.

VIII. 1 <sup>\*</sup>Utilitas ejus cuius intererat non peccatum esse in eo sita est, ne posthac tale quid patiatur ab eodem aut ab aliis. Gellius ex Tauro hanc speciem sic describit, *cum dignitas auctoritasve ejus in quem est peccatum tuenda est, ne prætermissa animadversio contemtum ejus pariat et honorem levet.* Sed quod de auctoritate læsa dicit, idem de libertate cuiusque aut alio jure læso intelligendum est. Apud Tacitum <sup>Noct. Au. v. 14 Ann. xlv. 61.</sup> legimus: *consuleret securitati justa ultione.* Ne qui læsus est ab eodem malum patiatur, tribus modis curari potest: pri-  
mum si tollatur qui deliquit, deinde si vires nocendi ei adi-  
mantur, postremo si malo suo dedoceatur delinquere, quod cum emendatione de qua jam egimus conjunctum est. Ne ab aliis lædatur qui læsus est, punitione non quavis, sed aperta atque conspicua quæ ad exemplum pertinet, obtinetur.

2 Ad hos ergo fines, et intra æqui terminos si dirigatur vindicatio, etiam privata, si jus nudum naturæ, id est, abduc-

*sint delictorum genera, alia quidem qua-  
spem præbent rerum meliorum, negue cu-  
rationem penitus repudiant, alia vero  
hominum insanabiliter peccantium: huic  
generi leges mortem malorum exitum re-  
perere, non tam ipsorum quam omnium  
aliorum bono, (Orat. II. p. 89 B. Ed.*

Spanhem.)

<sup>\* Utilitas ejus cuius intererat non  
peccatum esse]</sup> Etiam hujus rei in feris  
imago quædam. *Leo in adulteræ paenam  
consurgit.* Plinius *Historia Naturalis*  
viii. 16.

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or authority of him against whom the offense is committed is to be protected, lest punishment omitted produce contempt thereof, and diminish its honour; but what is said of injury done to authority is true of injury done to liberty, or to any other right. As Tacitus says of a person, *That he might consult his security by just punishment.*

That he who has been injured may not suffer evil from the same person, may be provided for in three ways: first, by the removal of the delinquent; second, by taking away his power of doing harm; thirdly, by teaching him, by suffering, not to offend; which is connected with the amendment of which we have spoken. That the person offended shall not be injured by another, is to be procured, not by any casual punishment, but by a punishment open and conspicuous, of the nature of example.

2 Up to these limits then, if vindictive punishment be directed, and be kept within the bounds of equity, even if inflicted by a private

tum a legibus divinis humanisque, et ab his quæ non necessario rei accidunt, respicimus, non est illicita: sive fiat ab ipso qui Iesus est, sive ab alio, quando hominem ab homine adjuvari naturæ est consentaneum. Atque hoc sensu admitti potest quod Cicero cum jus naturæ esse dixisset id, quod nobis non opinia sed innata vis affert, inter ejus exempla collocat vindicationem, quam gratiæ opponit: ac ne quis ambigeret quantum eo nomine vellet intelligi, vindicationem definit, *per quam vim ac contumeliam, defendendo aut ulciscendo, propulsamus a nobis ac nostris, qui nobis cari esse debent, et per quam peccata punimus.* Mithridates in oratione quam ex Trogo exscripsit Justinus: *adversus latronem si nequeant pro salute, pro ultiōne tamen sua omnes ferrum stringere.* Hoc ipsum ἀμύνης νόμον vocat in vita Arati Plutarchus.

3 <sup>γ</sup>Hoc naturali jure defendens se Sampson adversus Palæstinos, insontem se testatur fore si Palæstinos qui se malo affecerant malo vicissim afficeret: Et post peractam ultiōnem eadem se tuetur ratione, dicens se ipsis fecisse quod ipsi sibi fecissent priores. Platænenses apud Thucydidem: ὁρθῶς ἐτιμωρησάμεθα κατὰ τὸν πᾶσι νόμον καθεστῶτα, τὸν ἐπίοντα πολέμιον ὅσιον εἶναι ἀμύνεσθαι: merito eos ulti sumus, jure apud omnes recepto, ut hostilia parantem ulcisci liceat.

<sup>1</sup> *Hoc naturali jure]* Φόνον φόνῳ λελύσθαι. Romulus de Tatio occiso a Laurentibus, cædem cæde pensatam, apud Plutarchum, (Vit. Rom. p. 32 c.) Belisarius apud Procopium Vandalico-

rum i: φύσει γάρ πρόσεστι τοῖς ἀδικουμένοις η πρὸς τοὺς βιαζόμενούς ἐχθρά: naturalis enim est læsi hominis in eum qui vim intulū inimicitia. (Cap. 16.)

hand, it is not unlawful, if we look at the naked law of nature, that is, abstracting divine and human law, and conditions which are not necessary concomitants of the thing itself; whether it be inflicted by him who is injured, or by another; since for man to help man is spontaneous to nature. And in this sense, we may admit what Cicero says, when he declares the law of nature to be that which is given us, not by opinion, but by an innate power; and then places among the examples thereof vindictive punishment, which he opposes to mercy. And that no one may doubt how much he would have understood by that term, he defines vindictive punishment to be *that by which we repel force and contumely from us and ours, by defending or revenging, and by which we punish offenses.* So Mithridates, in Justin, speaks of our drawing the sword against robbers, *if not for safety, yet for revenge.* And so Plutarch calls this *the law of defense.*

3 On the ground of this Natural Law, Samson reasoned when he

Demosthēnes, oratione adversus Aristocratem, communem ait <sup>rag. 437 A.</sup> esse legem inter homines, ut eum qui nostra vi rapiat ulcisci nobis fas sit. Et Jugurtha apud Sallustium, cum dixisset <sup>Bell. Jug.</sup> <sup>c. 25.</sup> Adherbalem vitæ suæ esse insidiatum, addit, populum Romanum *neque pro bono neque pro recto facturum si ab iure gentium se prohibuerit*: id est ab ultione. Aristides orator et a poëtis, et a legum auctoribus, et a proverbii, et ab oratoribus, et omnibus denique hoc ait probari *ἀμύνεσθαι τοὺς ὑπάρχαντας, ultionem sumi de his qui injuriam facere aggressi sunt.* Maccabœos laudat <sup>Orat. pro qual. vir.</sup> <sup>Tom. III. p. 229 A.</sup> Ambrosius, quod etiam sab- <sup>De off. I. 40.</sup> bato <sup>a</sup>ulti sunt innocentium necem fratrum suorum. Idem adversus Judæos incensam a Christianis basilicam graviter querentes disputans, sic ait: *Ac certe si jure gentium agerem,* <sup>Epist. 29.</sup> <sup>p. 562 c.</sup> *dicerem quantas basilicas Judæi tempore imperii Juliani incenderint*: ubi <sup>b</sup>ius gentium vocat par pari referre. Nec aliter apud Tacitum Civilis: *egregium pretium laboris cepi,* <sup>Hist. IV. 32.</sup> *necem fratris, et vincula mea, et sœvissimas hujus exercitus voces, quibus ad supplicium petitus jure gentium pœnas reposco.*

4 Sed quia in rebus nostris et nostrorum affectu corrum-pimur, ideo simul multæ familiæ in unum locum convenerunt, judices constituti, et his solis data potestas vindicandi læsos,

<sup>a</sup> Ambrosius] Eudem vide oratione contra Symmachum.

<sup>a</sup> Ulti sunt innocentium necem fratrum suorum] Vide Josephum Antiquas Historia XIII. 1. de vindicata Johannis

morte.

<sup>b</sup> Jus gentium vocat par pari referre] Sic et Livius libro I. cum Laurentes jure gentium agerent, (c. 14.)

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said (Judg. xv. 3), *Now shall I be more blameless than the Philistines though I do them a displeasure, after they had injured him; and again, v. 11, As they did unto me so have I done unto them.* So the Platæans in Thucydides said. So Demosthenes against Aristocrates. So Jugurtha in Sallust against Adherbal. Aristides the orator proves from the poets, legislators, orators, and from proverbs, the right of taking revenge on those who attack. Ambrose praises the Maccabees, who, even on the sabbath-day, avenged the death of their innocent brethren. And he too, arguing against the Jews who complained of their synagogue as having been burnt by the Christians, says, *If I went upon the law of nations, I should say how many Christian houses of worship the Jews burnt at the time of Julian: where the law of nations to which he refers is, returning like for like.* So Civilis in Tacitus.

4 But because in things which concern us and ours, we are misled

ademta ceteris quam natura indulserat libertate. Lucretius (Lib. v. vers. 1147, et seqq.):

Acrius ex ira quod enim se quisque parabat  
Ulcisci, quam nunc concessum est legibus æquis,  
Hanc ob rem est homines pertæsum vi colere ævum.

Pag. 730 A. Demosthenes in Cononem : προεώραται ἐν τοῖς νόμοις εἶναι τούτων ἑκάστου τὴν δίκην, μὴ τῇ τοῦ προστυχόντος ὄρμῃ, μηδὲ βουλήσει ταῦτα κρίνεσθαι placuit de omnibus his in-juriis <sup>c</sup>ex legibus judicium exerceri, non autem ex cuiusque impetu atque arbitrio. Quintilianus : injuriaæ compensatio non solum juri inimica, sed paci : est enim lex, forum, iudex, nisi quem jure vindicari pudet. Imperatores Honorius et Theodosius : idcirco judiciorum vigor jurisque publici tutela in medio constituta, ne quisquam sibi ipsi permittere

L. nul. 14. C. de Jud. <sup>Declam. XII.</sup>

<sup>b</sup> Est apud DEMOSTHENEM, δρυγῆ, ira : neque vocem mutare necesse est. J. B.

<sup>c</sup> Ex legibus judicium exerceri, non autem ex cuiusque impetu atque arbitrio]

Tyndareus adversus Orestem sic declamat in Euripidis Oreste (vers. 491, et seqq.) :

Πρὸς τὸνδ' ἀγέν τις ἀν σοφίας ἡκοι πάρις;  
Εἰ τὰ καλὰ πάσι φανερὰ καὶ τὰ μὴ καλά,  
Τοὺς τις ἀνδρῶν ἔγνεται ἀσυντελέτερος,  
Οστις τὸ μὲν δίκαιον οὐκ ἔσκεψατο,  
Οὐδὲ ἥδεν ἐπὶ τὸν κοινὸν Ἑλλήνων νόμον.  
Ἐπεὶ γάρ ἐξίπνευσεν Ἀγαμέμνων βίον  
Πληγῆς θυγατρὸς τῆς ἀμῆς ὑπὲρ κάρα,  
Δισχιστούς ἔργους, οὐ γάρ αἰνόντως ποτε,  
Χρῆν αὐτὸν ἐπιθίναι μὲν αἰματος δίκην  
Οσίας διώκοντα, ἐκβαλεῖν τε δωμάτων  
Ματέρα, τὸ σύρφον τ' ἔλαβεν ἀν τῆς συμ-  
φορᾶς,

Καὶ τοῦ νόμου τ' ἀν εῖχεν, εὐσεβῆς τ' ἀν ἦν.  
Νῦν δὲ εἰς τὸν αὐτὸν δάκοντα ἥδε μητέρα,  
Κακὴν γάρ αὐτὴν ἐνθέως ἤγουμένος,

Αἵρε κακίων μητέρ' ἔγνετο πτανία.  
Ἐργοσματα δέ, Μενέλαος, τοσάνδε σε.  
Εἰ τόνδε εἰσοτείνειν δικάστης γυνή,  
Καὶ τοῦδε πάνι αἱ μητέρες ἀνταποκρενεῖν  
Κάτεσθ' δὲ καίνου γυνόμενος φόνος φόνη  
Δίστη, πέρας δέ τοι κακῶν προβήνεται;  
Huic me Jubes certare de sapientia ?  
Quae pulchra quæque fonda si cunctis patent,  
Isto homine tandem quis fuit dementior,  
Qui nec quod sequuntur est mente pervidit sua,  
Nec quod per omnem Graeciam leges jubent ?  
Namque ubi Agamemnon spiritum efflarat suum  
Transverberatus a mea nata caput,  
(Quod turpe facinus abit ut dicto probem)  
Tunc ille rite debuit matrem ream  
Peragero cedis e lare ejectam suo.  
Ita temperate pertulimus miseriam,  
Poenas petimus jure, servassum pluum.  
Nunc subit illum, quod prius matrem, nefas.  
Illam malam vocat ille, non injurya :  
Sed pejor illa est ipse dum matrem necat.  
Menseles, si permittis, hoc te interrogo :  
Irata si uxori conjugem occidet suum,  
Hanc ultior ipse filius tradet neci,  
Et rursus illo genitus hanc cardem nova  
Cede explabit, fine quo stabunt mala ?

by affection, therefore many families were brought together in one place, judges were constituted, and to these alone was given the power of righting those that were injured, the liberty which nature had given to other persons being taken away. So Lucretius of the origin of civil society : Demosthenes against Conon : Quintilian ; the emperors Honorius and Theodosius ; and king Theodoric. [See.]

5 Yet the old natural liberty remains; first, in places where there are no tribunals, as at sea. And to this perhaps we may refer the proceeding of Caesar when, as a private man, having been taken by

*valeat ultionem.* Rex Theodoricus : *hinc est quod legum re-* Cassiod. iv.  
*perta est sacra reverentia, ut nihil manu, nihil proprio* <sup>10.</sup>  
*ageretur impulse.*

5 Manet tamen vetus naturalis libertas, primum in locis  
 ubi judicia sunt nulla, ut in mari. Quo forte referri potest  
 quod Caius Cæsar privatus adhuc piratas, a quibus captus  
 fuerat, classe tumultuaria persecutus est, ipsorumque naves  
 partim fugavit, partim mersit, et cum proconsul negligenter  
 animadvertere in captos piratas, ipse eos in mare reversus  
 cruci suffixit. Idem locum habebit in locis desertis, aut ubi  
 Nomadum more vivitur. <sup>d</sup>Sic apud Umbricos narrat Nicolaus  
 Damascenus sibi quemque fuisse ultorem : quod et apud Mos- Apud Stob.  
 chos hodie impune fit, post tempus aliquod aditi judicis. Nec <sup>de Leg.</sup>  
 aliunde origo singularium certaminum quæ ante Christianismum

Quæ postrema plena prudentia ma-  
 teriam disserendi et philosophis et ora-  
 toribus presuerunt. Maximus Tyrius  
 in dissertatione ac referenda injuria,  
 (*Dissertat. II. pag. 22. Ed. Davis.*)  
 εἰ γάρ ὁ ἀδικηθεὶς ἀμύνεται, ἀεὶ με-  
 ταβαίνει τὸ κακὸν ἀπὸ δλῶν πρὸς ἀλ-  
 λον, καὶ μεταπῆδῃ καὶ διαδέξεται ἀδι-  
 κία δικιαν. εἰ γάρ τῷ αὐτῷ τούτῳ  
 δικαίῳ τῷ παθόντι συγχωρεῖ ἐπεξ-  
 έναι εἰς τὸν ἀδικήσαντα, ἐπαναχωρεῖ  
 αὐθὺς ἀπὸ ἑκείνου πρὸς τὸν αὐτὸν ή  
 τιμωρίᾳ, τὸ γάρ δικαιον ἐπ' ἀμφοῖν  
 ιστον. φὲ Ζεῦ καὶ οἶνον πεποίκας, δικαι-  
 οσύνην ἐξ ἀδικημάτων; καὶ ποι βαδεί-  
 ται τὸ κακὸν, καὶ ποὺ στήσεται Nam  
 si εἰ qui paetus est injuriam ultionem  
 sumet, transibit malum ab hoc ad illum  
 velut saltu quodam, et injustitia injusti-  
 tia succedit; quippe si hoc jure posito  
 concedis ei qui malum pertulit vindicare

in eum qui fecit, sequitur ut rursum ab  
 hoc ad illum se referat ultio, est enim  
 justum, par utrique parti. Si id ita est,  
 quid nobis fecisti, Jupiter, justitiam ex  
 injuriis conflatam? et quo procedet, ubi  
 vero stabit hoc malum? Aristides *Oratione de Pace*: τίς γάρ τῶν Ἑλλήνων  
 λειψθήσεται, εἰ διὰ τοὺς προτέρους  
 ἀπολωλοκότας, οἱ μετ' αὐτοὺς ἀεὶ ταν-  
 τὸ τοῦτο πείσονται; quis enim Graco-  
 rum erit reliquus, si propter eos qui jam  
 periere superstites alii perpetuo idem  
 malum ferent? (Tom. II. p. 78 c. Ed.  
 P. Steph.) Habet idem Aristides sen-  
 sum similem, in *Leuctrica secunda*.

<sup>d</sup>Sic apud Umbricos] An Umbros  
 in Italia significatos voluit? [Vide VA-  
 LESIUM in Excerpt. Peiresc. p. 513.]  
 Apud Afrorum multos idem moris fu-  
 isse testis est Leo Afer Lib. II. c. de  
 Tefechis, et capite de Teijenta, et alibi.

pirates, he collected ships, and partly put theirs to flight, partly sunk them; and then, when the proconsul was slow in punishing those who were taken, he himself gibbeted them. The same holds in deserts, or where men live a Nomadic life. So among the Umbrici, as Nicholas Damascenus relates, every one is his own avenger; which is also the custom among the Muscovites, after a certain time has elapsed from the application to the judge. And this was the origin of the duels which, before the introduction of Christianity, were common among the German nations, and are not yet sufficiently gone out of use. And so, as Paterculus relates, the Germans when they

LIB. II. 118.

<sup>e</sup> Germanicis nationibus usitata, alicubi needum satis desueta sunt. Ideo apud Velleium Paterculum mirantur Germani, cum Romanæ jurisdictionis formam conspicerent, quod injurias justitia finiret, quod solita armis discerni jure terminarentur.

SEN. I. DE  
CLEM. 20.VER. 272, ET  
SEQQ.LIB. II. QU.  
10. SUP. JOSEPH.  
DE REP. V.  
P. 471 N.  
TOM. II.

6 Lex Hebreæ propinquo occisi permittit ut extra asyli loca homicidam interficiat: recteque notant interpretes Hebræi talionem pro mortuo manu exigi posse; pro se, ut puta in vulnere, non nisi per judicem, quia scilicet difficilior est moderatio ubi proprius dolor accedit. Parem morem, privatim vindicandæ cædis apud vetustissimos Græcos fuisse apparent ex Theoclymeni verbis quæ apud Homerum sunt *Odyssææ* O. Sed maxime frequentia sunt hujus moris exempla inter eos qui communem judicem non habent. Hinc *justa bella definiri solent*, Augustino teste, quæ *ulciscuntur injurias*: et Plato bellicum certamen probat, *μέχρις οὐ ἀντίον αγαγασθῶ-*

<sup>e</sup> *Germanicis nationibus*] Gotthos suos corrigit rex Theudericus apud Cassiodorum III. 23. *Remove consuetudines abominanter inolitas: verbis ibi potius, non armis res tractet: et 24. Cur ad monomachiam recurritis? quid opus est homini lingua, si causam manus agit armata?* Trachonitis in oriente, νόμος πάντα τρόπον ἐπεξιέναι τὸν τῶν οἰκείων φονεῖ· *mos omnibus modis ultionem sumere de propinquorum homicidis.* [Hoc e Josepho, *Antiq. Jud.* Lib. xvi. cap. ix. § 1. Ed. Hudson.]

<sup>f</sup> *Ne alii impunitate illecti aliis quibusvis molesti sint*] Polybius *leones ob hominum appetitum crucifixos vident, quia ceteri metu panæ similis absterrentur eadem noxa.* Plin. Lib. viii. c. 16.

<sup>g</sup> *Sic Plutarchus*] Idem Pelopida, (p. 290) ὁ γὰρ πρώτος, οἱ ἔποικε, καὶ κυριώτατος νόμος τῷ συζεσθαι δεομένῳ τὸν συζειν δυνάμενον ἀρχοντα κατὰ φύσιν ἀποβίδωσι. *Prima eademque antiquissimæ lex eum qui servare potest ei qui salute opus habet naturaliter magistratum designat.* Et Philopemone: *τοῦς ἑαυτοῦ πολίτας δια-*

became acquainted with the Roman jurisdiction, admired to see injuries concluded by judicial proceedings, which they were accustomed to see terminated by an appeal to arms.

6 The Hebrew Law permitted the relative of the person slain to kill the slayer, anywhere without the places of refuge: and the Hebrew commentators rightly note, that retaliation for a person slain might be executed by personal force; but for the person himself, for example for a wound, no otherwise than before a judge; because moderation is more difficult when the pain comes nearer ourselves. That a like mode of avenging murder by the hands of a private person prevailed among the Greeks of old, appears in Homer. But the examples of this are most frequent among those who have not a proper judge. *Just wars*, says Augustine, *are commonly defined to be those which avenge injuries;* and Plato approves battles on such ground.

*σιν ὑπὸ τῶν ἀναιτίων ἀλγούντων δοῦναι δίκην· donec qui in culpa fuerint cogantur innocentibus dolore affectis pœnas pendere.*

IX. 1 Utilitas indistincte quorumlibet, qui finis erat tertius, easdem habet partes quas illa quæ ad læsum pertinet. Nam aut hoc agitur, ne qui uni nocuit aliis noceat, quod fit eum tollendo aut debilitando, sive constringendo ita ut nocere nequeat, aut emendando: aut 'ne alii impunitate illecti aliis quibusvis molesti sint, quod ex suppliciis conspicuis obtinetur, quæ Græci παραδείγματα, Latini exempla vocant: quæ ideo adhibentur ut unius pœna metus sit multorum, ut pœnæ genere deterri ceteri possint, ut leges loquuntur, *ἴνα ἄλλοι πρόνοιαν ποιῶνται καὶ φοβῶνται*, ut Demosthenes.

2 Hujus quoque juris potestas naturaliter penes unumquemque est. Sic Plutarchus virum bonum ait a natura

L. 1. C. ad  
L. Jul. de  
Rep.  
L. 7. C. ad  
L. Fab. de  
Plag.  
Oral. in  
Nœr. p.  
528 B.  
Precept.  
pouit. p. 317 B.

λαβὼν οὐτε νόμον, οὐτε χειροτονίαν περιμείναντας, ἀλλ' οὐ διὰ παντὸς ἀρχοντὶ τῷ κρείττονι κατὰ φύσιν ἐπομένους'. Suscepit cives nos qui neque legum neque suffragiorum tempus expetaverunt: sed ipsum sequerant naturæ lege, quæ semper potiorum vult imperare deterioribus. (Pag. 363 A.) Similia apud eum habet fine vite T. Flaminii. Scriptor de causis corruptæ eloquentiæ, de oratoribus agens (cap. 36.) *Hi ne privati quidem sine potestate erant, cum et populum et senatum consilio et auctoritate regerent.* Chrysostomus II. ad

Corinthios vii. 13. de Mose: καὶ πρὸ τῆς χειραγωγίας δημαγωγὸς ἦν διὰ τῶν ἔργων. διὸ καὶ σφόδρα ἀνοήτως ἔλεγε πρὸς αὐτὸν ὁ Ἐβραῖος ἑκένος: τίς σε κατέστησεν ἀρχοντα καὶ δικαστὴν ἐφ' ἡμᾶς; τί λέγεις; τὰ ἔργα ὅρας, καὶ περὶ τῆς προσηγορίας ἀμφιβάλλεις, ὥσπερ ἀνεῖ τις ἵδοι τέμνοντα τὸν λατρὸν ἀριστα, καὶ τῷ πετονηκότι μέλει τοῦ σώματος βοηθοῦντα, λέγοι, τίς σε κατέστησεν λατρὸν καὶ τέμνειν ἐκέλευσεν; ή τέχνη, φ' βέλτιστε, καὶ οὐ νόσος οὐ σή σύντονος καὶ τοῦτον η ἐπιστήμη τοιοῦτον ἐποίησε.

IX. 1 The utility of persons in general, which was the third end of punishment, offers the same divisions as the utility of the injured man. For either the object is that he who has done harm to one may not do harm to others; which is secured, either by taking him away, or by taking away his power of mischief, or by constraining him so that he cannot do harm, or by amending him: or else the object is to prevent others from being tempted by impunity to do harm to any others, which is provided for by conspicuous punishments, examples. These are employed, that the punishment of one may produce the fear of many; that others may be deterred by the kind of punishment, as the laws speak; that others may be compelled to look forward and fear, as Demosthenes says.

2 The right of inflicting such punishment, is also, by Natural Law, in the hands of every man. So Plutarch says that a good man is by nature pointed out as a perpetual magistrate; for by the law of

Tusc. qu.  
iv. 23.

magistratum designari, et quidem perpetuum: nam ipsa natura  
lege ei principatum deferri, qui agat justa. Sic sapientem  
nunquam esse privatum Nasicae exemplo probat Tullius; et  
Lollium non unius anni consulem Horatius vocat: et Euripi-  
des *Iphigenia in Aulide* (vera. 375):

Mente qui prudente pollet is magistratum gerit.

Quae tamen in republica intelligenda sunt, quatenus ejus leges  
id ferunt.

Apud Stob.  
Serm. 44.

3 De hoc naturali jure ita loquitur Democritus: ipsius enim verba quia notabilia sunt adferam. Primum de jure bestias interficiendi sic illi videtur: κατὰ δὲ ζών φόνου καὶ μὴ φόνου ὡδε ἔχει· τὰ ἀδικέοντα καὶ θέλοντα ἀδικεῖν ἀθῆνος ὁ κτείνων, καὶ πρὸς εὐ ἐστ' οὐν τοῦτο ἔρδειν μᾶλλον η μή· de occidendis aut non occidendis animantibus ita se res habet: quae injuriam faciunt aut facere volunt quisquis occiderit, purus est, adeo quidem ut hoc fecisse

καὶ γὰρ τέχνη τὸ δρχειν ἀστιν, οὐκ δξίωμα μόνον, καὶ τέχνη τεχνῶν πασῶν διωτέρα· Etiam antequam manus populum educeret, dux erat ipsis factis. Valde igitur stulte Hebreus ille ei dixit: quis te constituit nobis principem ac iudicem? Quid dicis? facta vides, et de nomine facis controversiam; velut si quis medicum videat optime secantem ac sic opitulatatem aegro corporis membro, deinde ei dicat, quis te constituit medicum, quis secare præcepit? ars, mi bone vir, et morbus tuus: sic et Mosem sua peritia talem fecit; nam et imperare non dignitas tantum est, sed et ars, et quidem artium omnium sublimissima. (Tom. III. pag. 631, 632. Ed. Savil.) Tractat idem scriptor hoc ipsum argumentum ad Eph. iii. in fine: (Tom. eod. p. 798) η ἀδικία η σὴ καὶ η ὠμότης, φησιν, αὕτη με κατέστησεν δρχούτα καὶ δικαστήν tua, inquit, *injustitia, tua seritas me constituit principem et iudicem.* [PLUTARCHI locus, cuius occasione omnia

ista addita sunt, non satis adcurate refertur, ut insipienti patebit. Preterea illorum sententia posset videri repugnare principiis Auctoris nostri, ut ostendimus in Gallicis nostris Notis. J. B.]

<sup>b</sup> *Arte diluvium]* Aliquos et postea moris primi memores: ita Dicæarchus et alii, quos testes citat Hieronymus contra Jovinianum. (Tom. II. p. 78. Edit. Basil.)

<sup>1</sup> *Quo serpentes et animalia venenata percutio]* Καθάπερ οὖν ἔχεις καὶ σκορπίους καὶ στοιβόλα, πρὶν δακεῖν η τρῶσαι καὶ συνόλως δρμῆσαι, θεασάμενοι μόνον χωρὶς ὑπερθέσεως κτείνομεν, προφυλαττόμενοι διὰ τὴν ἐνυπάρχουσαν ἐν αὐτοῖς κακίαν, τὸ μηδὲν παθεῖν. τὸν αὐτὸν τρόπον καὶ ἀνθρώπους ἔξιν τιμωρεῖσθαι, οἱ φύσεως ἀπλαχύντες ημέρου διὰ τὴν κοινωνίας αἰτίαν λογικὴν πηγὴν, ἀπιτηδέουσει πρὸς θηρίων ἀτιθάσσων ἀγριότητας μεταβάλλουσιν, ἐν ηδονῇ καὶ ὀφελείᾳ

nature, authority is given to him who does just things. So Cicero proves that a wise man is never a private man, by the example of Scipio Nasica. And Horace calls Lollius, Consul not for his year alone: so Euripides: which however must be understood with reference to the laws of the State.

*quam non fecisse sit rectius.* Et mox: κτείνειν χρή τὰ πημαίνοντα παρὰ δίκην πάντα περὶ παντός· ea quae injuste nobis nocent omnino et omnia fas occidere. Et certe non improbable est hoc more vixisse viros probos <sup>h</sup>ante diluvium, antequam Deus suam voluntatem de vertendis in hominum alimenta animantibus ceteris prodidisset. Rursus: ὅκως περὶ κινδέων τε καὶ ἐρπετῶν γεγράφαται τῶν πολεμίων, οὕτω καὶ κατ' ἀνθρώπων δοκεῖ μοὶ χρεῶν εἶναι σκοπεῖν· Quae vero de vulpibus et de inimicis serpentibus scripsimus, eadem in hominibus facienda videntur. Tum vero subjungit: κιξάλλην καὶ λεστὴν πάντα κτείνων τις αἴθως ἀν εἴη, καὶ αὐτοχειρία καὶ κελεύων καὶ ψῆφῳ· furem et latronem qui quocumque modo occiderit, sive manu, sive jussu, sive suffragio, innocens est. Ad quos locos resperxisse mihi videtur Seneca, cum ait: *cum cervices noxio præcidi* <sup>Lib. I. de Ira.</sup> <sub>c. 16.</sub>

τιθέμενοι τὸ κακῶς τοιεῖν ὅσους ἀν δύνωνται· *sicut ergo vipers et scorpions et que alia veneno nocent, priusquam aut mordeant, aut ullum in nos impetum faciant, statim sine mora occidimus, præcaventes ne quid patiamur mali ab ea qua in ipsis est malignitate; eundem ad modum et homines puniri par est, qui naturam nacti mansuetam, propter fontem rationis que ad societatem trahit, institutis in serarum saevitiam transeunt, utilitatique ac voluptati habent nocere quam possunt plurimis.* Hæc Philo *De Specialibus Legibus* II. (pag. 793 A. B.) Claudius Neapolitanus apud Porphyrium Lib. I. de non esu animalium: οὐκ ἔστι γάρ δύστις ἤδη ὅφιν οὐκ ἔκτινε δυνάμενος, εἰς μήτ' αὐτὸς δηχθεῖν μήτ' ἀλλος ἀνθρωπος· *nemo est qui serpente sibi conspectum si possit non occidat, ne aut ipse ab eo vulneretur aut aliis.* (Pag. 32.) Vide, si vacat, et sequentia: ibidem non multo post: ὅφιν καὶ σκορπίου, καὶ μη ἐπίστων

ἡμῖν, κτείνομεν, ίνα μηδ' ἀλλος πρὸς αὐτῶν τι πάθῃ, τῷ κοινῷ γένει τῶν ἀνθρώπων ἀμυνόμενοι· *serpentem et scorpium, etiamsi ab iis non impetamur, occidimus, ne cui noceat alii, et vindicat hanc præstamus humano generi.* (Pag. 40. Ed. Lugd. 1620.) Porphyrius ipse libro II. ἀσπερ γάρ οἰκειότητος οὐσης ἡμῖν πρὸς τοὺς ἀνθρώπους τὸν κακοποιὸν, καὶ καθάπερ ὑπὸ τινος πνοῆς ἤδης φύσεως καὶ μοχθηρίας φερομένους πρὸς τὸ βλάπτειν τὸν ἐπιγχάνοντα, ἀναιρεῖν ἡγούμενα δεῖν καὶ κολάζειν ἄπαντας, οὕτως καὶ τῶν ἀλόγων ζῴων τὰ διδικά τὴν φύσιν καὶ κακοποιὰ, πρὸς τε τὸ βλάπτειν ὠρμημένα τῇ φύσει τοὺς ἐμπελαζόντας, ἀναιρεῖν ίστος προσήκει· *sicut enim, quamquam societas nobis quedam est cum hominibus malis, etiamsi qui suopel ingenio ac malitia veluti vento vehementer aguntur, ut cuivis sine discrimine noceant, tamen eos omnes recte a nobis puniri censemus; ita et mutorum animalium*

3 Of this Natural Law Democritus speaks; first, of the right of killing harmful beasts; and certainly it is not improbable that good men did this before the deluge, before God had delivered his will to man, that other animals should become his food. And then he extends this to man: and afterwards says that whoever kills a

*Sen. de Ira, venenata percutio.* Et alibi: *ne viperas quidem et natrices, et si qua morsu aut ictu nocent, effligeremus, si ut reliqua mansuefacere possemus, aut efficere ne nobis aliisque periculo essent.* Ergo ne homini quidem nocebimus quia peccavit, sed ne peccet.

Apud Stob.  
Serm. 33.

4 Sed cum et facti inquisitio sæpe magnam diligentiam, et pœnæ æstimatio multum prudentiae et æquitatis desideret, ne dum quisque de se nimium præsumeret, aliis non credenti-bus, rixæ orientur, eo placuit hominum justis communitati-bus eos diligere quos optimos ac prudentissimos putarent, aut fore sperarent. Idem Democritus: οὐκ ἀν ἐκώλυνοι νόμοι ζῆν ἔκαστον κατ' ὅδιαν ἐξουσίαν, εἰ μὴ ἐτερος ἐτερος ἐλυμαίνετο. Φθόνος γὰρ στάσιος ἀρχῆν ἀπειργάζετο· non prohibuissent utique leges suo quemque arbitrio vivere, nisi alter alterum offensum iisset. *Invidia enim seditioni molitur exordium.*

5 Sed sicut in ultione factum modo diximus, ita et in hac ad exemplum punitione manent vestigia ac reliquæ prisci

*ea qua sui natura sunt injusta et nocere amantia, queque impetu ingenii sui feruntur in obvia cuiusque perniciem, occidere ratione non caret.* (Pag. 159.) Et hoc est quod vult Pythagoras apud Ovidium *Metam.* xv. *Nostrunque pectentia lethum Corpora missa neci salva pietate fatemur.* (Versa. 108, 109.)

\* *Illico a quovis homine poterat interfici]* Adde locum Josephi XII. (6. § 2. Ed. Huds.) Mosem Maimonidem ad XIII. articulos, et Directoris libro III.

c. 41.

\* Non simpliciter, sed postquam accusatus et damnatus fuerat a Judicibus. Vide PUENDORFUM nostrum, *De Jure Nat. et Gent.* Lib. viii. cap. 3. § 13. et Clarissimum CLERICUM in locum Deuteron. de quo agitur. *J. B.*

\* *Judicium zeli]* Vide 1 Maccab. ii. 24, 26.

\* *Respublica Hebreæ nondum tunc temporis prorsus constituta erat, quemadmodum fuit postea.* Vide eundem

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thief or robber, by his hand, command, or vote, is innocent. And Seneca seems to have referred to this. [See the passages.]

4 But since the proof of the fact often requires great care, and the estimate of punishment requires great prudence and great equity, communities of men have chosen, for this office, those whom they thought to be, or hoped to find, the best and most prudent. So Democritus.

5 But as in punishment vindictive, so in punishment exemplary, there remain vestiges of the original law, in those places and between those persons who are not under fixed judgments; and besides, in some excepted cases. So amongst the Hebrew customs, a Hebrew apostatizing from the true God and joining idolatrous worship, might be at once put to death by any person. The Hebrews

juris, in iis locis atque inter eas personas quae certis judicis non subsunt: ac præterea in quibusdam casibus exceptis. Sic <sup>Deut. xiiii. 9.</sup> Hebræorum moribus Hebræus a Deo et Dei lege deficiens, aut ducem se ad falsos cultus præbens, <sup>1</sup> illico a quovis homine poterat interfici. <sup>1</sup> Judicium zeli id vocant Hebræi, quod a Phineas <sup>Num. xxv.</sup> primo exercitum aiunt, et inde abiisse in morem. Sic Judæum quendam Græcis se ritibus polluentem occidit Mathatias. Sic trecenti alii Judæi a popularibus suis occisi <sup>1 Maccab. ii. 34.</sup> referuntur, libro qui vulgo dicitur Maccabæorum tertius. Nec alio obtentu instituta lapidatio in Stephanum, et conjuratio in <sup>Act. vii. 57.</sup> Paulum: multaque alia exempla ejusmodi exstant et <sup>3</sup> apud <sup>Act. xxiii. 13.</sup> Philonem, et apud Josephum.

6 Tum vero apud multos populos et dominis in servos et parentibus in liberos mansit jus puniendi plenum, etiam ad mortem usque. Sic Sparta Ephoris licuit civem occidere extra judicium. Et ex his quidem quæ diximus quale sit circa pœnas jus naturæ, et quoisque manserit intelligi potest.

X. 1 Nunc illud videndum est, num lex evangelica

Doctissimum Interpretem, quem modo laudavi, in Num. xxv. 7. et Celeberrimi J. FR. BUDDÆI Dissertationem *De Jure Zelotarum in Gente Hebraæ*, § 34. et seqq. J. B.

<sup>3</sup> *Apud Philonem]* Cujus et hoc in libro *de Sacrificantibus*: κολαστέον ὡς δίμιον καὶ κοινὸν ἔχθρὸν ὅντα, δλίγα φροντίσαντας οἰκειότητος, καὶ τὰς παραινέσσεις αὐτοῦ διαγγελτέον πάσι τοῖς εὐσεβείας ἐρασταῖς, οἱ ἀνυπερθέτη τάχει ταῖς κατ' ἀνδρὸς ἀνοσοῦ ἐπι-

δραμοῦνται τιμωρίαις, κρίνοντες εὐ-  
αγὲς τὸ κατ' αὐτοῦ φονῆν· puniendus  
talis ut hostis publicus omnium, spreta  
qualicunque cum eo necessitudine, ejus-  
que evanescere rulgando omnibus pietati-  
tem amantibus, ut sine mora accurrant  
undique ad expetendum de viro impio  
supplicium, firme credentes sanctam esse  
rem ejusmodi hominis interficiendi appeti-  
tum. (Pag. 855 ε.) Et alter locus  
non minus insignis circa finem de mo-  
narchia (Lib. 1. pag. 818, 819.)

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call it a judgment of zeal, of which they say Phineas set the first example. (Numb. xxv.) So in the Maccabees, Mattathias slew a Jew polluting himself with Greek rites; and so in 3 Maccab. 300 Jews were killed by their countrymen. And the stoning of Stephen, and the conspiracy against Paul, were on the same pretext, as well as many other examples in Philo and in Josephus.

6 So also among many peoples, masters retained the right of punishing their servants, and parents their children, even to death. So at Sparta, the Ephori could put a citizen to death without trial.

From what we have said, we may see what is the Law of Nature with regard to punishment, and how far it continued.

X. 1 We must now consider whether the Gospel Law has limited this liberty more narrowly. Certainly, as we have elsewhere said, it

libertatem illam arctius circumscriperit. Certe, ut alibi diximus, non mirum est, quædam quæ natura et per leges civiles licent vetari lege divina, eaque perfectissima, et præmium promittente natura humana majus: ad quod consequendum non immerito virtutes requiruntur, quæ sola naturæ præcepta excedant. <sup>n</sup> Castigationes que neque infamiam neque damnum permanens relinquunt, et pro æstatu aut alterius qualitatis ratione sunt necessarie, si ab iis fiant quibus leges humanæ id permittunt, puta a parentibus, tutoribus, dominis, magistris, nihil habere quod cum præceptis evangelicis repugnet, ex ipsa rei natura satis intelligi datur. Sunt enim hæc remedia animorum non minus innocentia, quam pharmaca sensui ingrata.

2 De ultione aliter sentiendum est. Nam quatenus duntat animum dolentis exsatiat, illicitam esse etiam naturaliter, tantum abest ut Evangelio conveniat, supra ostendimus. Lex vero Hebræa non modo vetat odium asservari in proximum, id est, popularem, Levit. xix. 17, sed et communia quædam

<sup>n</sup> *Castigationes]* Servorum filiorum que peccata non coercere, peccatum est. Lactantius de Ira Dei c. 18. ubi plura ad hanc rem.

<sup>o</sup> *Ut imperfectiori tempori congruentem]* Oculum pro oculo, que, si dici potest, injustorum justitia est. Augustinus in expositione Psalmi cviii. citatus C. sex differentiæ 23. 1. Caus. 23. quæst. 3.

<sup>p</sup> *Tertullianus]* Adversus Marcionem iv. (Cap. 16.) Idem libro de Patientia: Christus gratiam legi superducens amplianda adimplendaque legi adjutricem suam patientiam praeficit, quod ea sola ad justitiae doctrinam retro defuisse. (Cap. 6.) Chrysostomus ad Ephesios cap. iv. 13. διὰ τοῦτο εἰπεν, ὅφθαλμὸν ἀντὶ ὅφθαλμοῦ καὶ ὁδόντα ἀντὶ ὁδῶντας, ἵνα τὰς ἑκείνου δῆση χεῖρας, οὐχ ἵνα

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is not to be wondered at, that some things which are permitted by the Natural and the Civil Laws are forbidden by the Divine Law; that being both the most perfect of Laws, and one which promises rewards beyond the discovery of mere human nature; and to obtain which, very reasonably, virtues are required which go beyond the mere precepts of nature. But punishments or castigations which neither leave behind them infamy nor permanent damage, and which are necessary, according to the age or other quality of the offender, if they are inflicted by those to whom human laws give such permission, as parents, tutors, masters, teachers, have nothing which is at variance with the evangelical precepts. These are remedies of the soul, as innocent as bitter medicines are.

2 With regard to revenge, the case is different. For so far as it is a mere satisfaction of the mind of the person offended, it is unlawful, not only by Gospel Law, but by Natural Law. The Hebrew Law

beneficia talibus inimicis impendi præcipit, Exod. xxiii. 4, 5. Quare proximi nomine ad omnes homines prolato per Evangelium, patet a nobis requiri, non modo ne noceamus inimicis, verum etiam ut benefaciamus, quod et diserte imperatur Matthæi v. 44. Lex tamen Hebreis graviores injurias permittebat ulcisci, non manu, sed adito judice. At Christus idem nobis non permittit, quod appetet ex illa oppositione, *audistis dictum fuisse, oculum pro oculo: et mox: ego vero dico vobis.* Quanquam enim quæ sequuntur de arcenda injuria proprie agunt, et hanc quoque licentiam aliquatenus saltem restringunt, multo tamen magis ultiōem improbare censenda sunt, quia veterem permissionem <sup>ut</sup> imperfectiori temporis congruentem rejiciunt: οὐκ ἀδίκου τῆς δικαίας ἀμύνης οὐσῆς, ἀλλὰ κρείττονος τῆς ἀνεξικακίας; non quod iniqua sit justa ultiō, sed quod ei præstet patientia, ut est in constitutionibus Clementis Lib. vii. cap. 23.

3 Qua de re sic loquitur <sup>¶</sup>Tertullianus: *novam plane patientiam docet Christus, etiam vicem injuriae prohibens*

*τὰς σὰς δυτεξαγάγγ, οὐχ ἵνα τῶν σῶν ὄφθαλμῶν ἀπειρξῃ τὴν βλάβην μόνον, ἀλλ' ἵνα καὶ τὸν ἑκένον διατηρίσῃ σώσους. ἀλλ' ὅπερ ἔχετον, τίνος ἔνεκεν συγκεχωρημένης ἀμύνης, ἐνεκαλοῦντο οἱ τῷ πράγματι κεχρημένοι; τοῦτο: συγγινώσκει ὁ θεός τοῖς ὑπὸ τῆς ἐπηρεᾶς ἴσως συναρπασθεῖσι καὶ ἐπὶ τὴν ἀμυναν ὀρμηκόσι, διὸ λέγει, ὄφθαλμὸν ἀντὶ ὄφθαλμοῦ. καὶ πάλιν. ὅδοι μνησι-* κάκων εἰς θάνατον. εἰ δὲ ἐνθα δόφθαλμὸν ἀντὶ ὄφθαλμοῦ πηροῦν ἔξῆν, τοσάντη κεῖται τιμωρία τοῖς μνησικάκοις, πόσῳ μᾶλλον τοῖς καὶ παρέχειν ἔαντοντε πρὸς τὸ παθεῖν κακῶς κελευσθεῖσι· εἰ de re dicit, oculum pro oculo, dentem pro dente, ut illius manus cohibeat, non ut tuas excite contra, ut non tuis tantum oculis noxam arceat, sed et illius oculos salvos præstet: sed quod quærebam hoc erat,

too, not only forbids persons to bear malice against their neighbour, that is, their countryman, but even commands them to bestow certain common benefits on such enemies. And therefore the name of *neighbour* being by the Gospel extended to all men, it is required of us, not only that we do not do harm to our enemies, but that we do them good; which is also directly commanded, Matth. v. 44. The Hebrew Law permitted men to revenge the graver injuries, not by their own hand, but by recourse to the judge. Christ, however, does not permit the same to us; as appears by the opposition, *Ye have heard it said—But I say unto you.* For though what follows properly refers to the repelling of injury, and in some degree restricts even the liberty of doing that; these precepts are much more to be understood as condemning revenge; for they reject the ancient permission as suitable only to a more imperfect time. So the Clementine Constitutions.

3 Tertullian comments on Christ's teaching, as an addition to that

vii. 10.

*permissam a Creatore oculum exigente pro oculo, et dentem pro dente, contra ipse alteram amplius maxillam offerri jubens, et super tunicam pallio quoque cedi. Plane hæc Christus adjecerit, ut supplementa consentanea disciplinæ Creatoris. Atque adeo hoc statim renuntiandum est, an disciplina patientiæ prædicetur penes Creatorem. Sic per Zachariam præcipit, ne unusquisque malitiam fratris sui meminerit, sed nec proximi. Nam et rursus: malitiam, inquit, proximi sui unusquisque ne recogitet. Multo magis patientiam indixit injuriæ, qui indixit oblivionem. Sed et quum dicit, mihi vindictam et ego vindicabo, proinde patientiam docet vindictæ exspectatricem. In quantum ergo non capit, ut idem videatur et dentem pro dente, oculum pro oculo, in vicem injuriæ exigere, qui non modo vicem, sed etiam ultionem, etiam recordationem et recogitationem injuriæ prohibet, in tantum aperitur nobis quomodo oculum pro oculo et dentem pro dente censuerit, non ad secundam injuriam talionis permittendam, quam prohibuerat interdicta ultione, sed ad primam coercendam quam prohibuerat opposita talione, ut unusquisque respiciens licentiam secundæ injuriæ a prima semetipsum contineret. Facilius enim vim comprimi scit repræsentatione talionis, quam re-promissione ultionis. Utrumque autem constituendum fuit pro natura et fide hominum, ut qui Deo crederet, ultionem a Deo exspectaret: qui minus fideret, leges talionis timeret.*

*4 Hanc legis voluntatem de intellectu laborantem, dominus et sabbati, et legis, et omnium paternarum dispositionum Christus et revelavit et compotem fecit, mandans alterius quoque maxillæ oblationem, ut tanto magis vicem injuriæ extingueret, quam et lex per talionem voluerat im-*

*cur ultione permissa culpantur ii qui ad eam decurrunt? mox: ignoscit Deus iis, quos si forte contumelie sensus abripuit et ad ultionem tulit impetus; ob id dicit, oculum pro oculo: at alibi: viæ iracundorum ad mortem, quod si, ubi oculum*

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of the Old Testament, that vengeance is to be left to God. They who believe in him, are to expect that He will punish; they who do not, are to fear retaliation.

4 Christ, he adds, did not destroy the teaching of the Old Law. God has provided judges of injury. Without this, forbearance loses its reward: for it is by the fear of punishment that injury is controlled.

*pedisse, certe quam prophetia manifeste coërcuerat, et memoriā injuriae prohibens et ultionem ad Deum redigens. Ita si quid Christus intulit, non adversario, sed adjutore præcepto, non destruxit disciplinas Creatoris. Denique si in ipsam rationem patientiae præcipienda, et quidem tam plenæ atque perfectæ consideremus, non consistet si non est Creatoris, qui vindictam repromittit, qui judicem præstat. Alioqui si tantum patientiae pondus non modo non repercutiendi, sed et aliam maxillam præbendi, et non modo non remaledicendi, sed etiam benedicendi, et non modo non retinendi tunicam, sed amplius et pallium concedendi is mihi imponit, qui non sit me defensurus, in vacuum patientiam præcepit, non exhibens mihi mercedem præcepti, patientiæ dico fructum, quod est ultiō, quam mihi permisisse debuerat si ipse non præstat, aut si mihi non permittebat ipse præstaret, quoniam et disciplinæ interest injuriam vindicari. Metu enim ultiōnis omnis iniquitas refrænatur. Ceterum passim emissā libertate, dominabitur utrumque oculum effossa, et omnem dentem excitatura præ impunitatis securitate.*

5 Censem, ut videmus, Tertullianus non modo Christianis postulationem talionis esse vetitam, sed ne Hebreis quidem permissam, tanquam quæ vitio careret, sed majoris mali vietandi causa. Quod quin verum sit de tali postulatione, quæ ex odio venit, non est dubitandum, ut ex superioribus apparet. Nam hanc improbatam etiam illis qui inter Hebreos sapientia excellebant, nec legis verba tantum sed et propositum intuebantur, ex Philone appareat, apud quem Judæi Alexan-<sup>Pag. 962 D.</sup> drini in Flacci Judæorum vexatoris calamitate ita loquuntur: οὐκ ἐφηδόμεθα, ὃ δέσποτα, τιμωρίαις ἔχθρον, δεδιδαγμένοι πρὸς τῶν ιερῶν νόμων ἀνθρωποπαθεῖν· non delectamur, o-

*vice oculi eruere permissum est, tanta est injuriis jubentur? (Tom. III. pag. 845,  
iracundi pena, quanto magis apud eos 846. Edit. Savil.)  
qui mala passi præbere se ulterioribus*

Without this, violence would go to extremes.

5 Thus Tertullian thinks that revenge was permitted to the Hebrews, not as a thing blameless, but to avoid a greater evil. And this is undoubtedly the case, with such demand of satisfaction as proceeds from wrath; and so the purpose of the law was understood, as appears in Philo. And this is the point to which Christ's precepts

*domine, ultione de inimico, nam <sup>q</sup> ex sacris legibus didicimus hominum misereri.* Et hoc pertinet quod Christus a nobis indistincte exigit, ut omnibus remittamus qui in nos deliquerunt. Matth. vi. 14, 15, id est, ob sensum mali nostri malum illis nec procuremus, nec optemus: nam id qui facit, ut cum Claudio loquar, *ferus est, legumque videtur vindicatam præstare sibi.* Quam ob causam Lactantius dictum illud *D. Offic. I. 7.* Ciceronis commemorans: *justitiae primum munus est, ne cui noceat nisi lacesitus injurya,* ait simplicem veramque sententiam duorum verborum adjectione corruptam: et Ambrosius idem illud Ciceronis dictum vacare ait Evangelii auctoritate.

*De Malt.*  
*Cons. v. 224.*  
*Lib. vi. 18.*

*D. Offic. I. 7.*

*Offic. I. 28.*

*In Criton.*  
p. 49 B.

6 Quid autem de ultione dicemus, non quatenus præteritum respicit, sed quatenus in futurum cavet? Sane et hanc condonari vult Christus, primum <sup>r</sup> si qui nos læsit testimonia probabilia det poenitentis animi, Lucæ xvii. 3; Ephes. iv. 32; Coloss. iii. 13, quibus locis de pleniore quadam remissione agitur, id est, quæ etiam in jus veteris amicitiae restituat eum qui peccavit; unde sequitur, ut nihil ab eo poenæ nomine exigi debeat. Præterea etiamsi absint talis poenitentia signa, damnum haut nimium grave insuper habendum Christus præcepto dimittendæ tunicæ docet. Quin et Plato dixit non

<sup>q</sup> *Ex sacris legibus didicimus hominum misereri]* Vide Originem *adversus Celsum.* (Lib. vii. pag. 348.)

<sup>r</sup> *Si qui nos læsit testimonia probabilia det penitentis animi]* Vide Mosem Maimonidem citatum ab eruditissimo Constantino libro de damno dato c. viii.

### § 7.

<sup>\*</sup> *Hæc enim est simpli restitutio nihil penale continens]* Lex Wisigothorum vi. 4, 3.

<sup>t</sup> *Pecuniariam multam]* Vide eundem Constantimum d. cap. viii. § 1.

<sup>u</sup> *Divortio se liberare maluit]* Au-

tend, when he enjoins forgiveness of injuries. We are not to procure or wish ill to men from the feeling of the ill which they have done us. So Claudian: and so Lactantius and Ambrose correct Cicero.

6 But what are we to say of revenge, as it respects, not the past, but protection for the future? Here also Christ enjoins us to forgive, if he who has injured us shews any signs of penitence; [see the passages;] in which he speaks of a plenary remission of injury, which may restore the offender to his former place in our good will; whence it appears that nothing is to be required of him in the way of punishment. And even if signs of such penitence be wanting, we are not to take it too severely, as the precept, of giving our coat also, shews. And even Plato said something like

referendum malum εἰ τε δεῖ ημᾶς τῶνδε χαλεπώτερα πάσχειν, etiamsi quid gravius patiendum nobis immineat, qui sensus et apud Maximum Tyrium exstat. Ὑβρεως δίκην, id est, actionem ob acceptam contumeliam aliquam (qualem Christus alapæ nomine indicat) negabat Musonius aut se instituturum, aut cuiquam ut institueret auctorem fore: multo enim rectius condonari talia.

7 Quod si dissimulatio magnum secum periculum ferat, ea cautione contenti esse debemus, quæ quam minimum noceat. Nam ne apud Hebræos quidem in usu erat talio, ut Josephus <sup>Antiq. Jud.</sup> iv. 8. § 33. et alii Hebræorum doctores notant, sed solebat qui lœsus erat ultra impendia a se facta, de quibus seorsim lex exstat Exod. xxi. 19, ("hæc enim est simpli restitutio nihil pœnale continens) pro talione 'pecuniariam multam accipere: quod et Romæ factum docet apud Gellium Favorinus. Sic Josephus <sup>Lib. xx. 1.</sup> domini nostri Jesu educator, cum uxorem suam adulterii compertam crederet, "divortio se liberare maluit, quam committere ut traduceretur: atque id fecisse dicitur quia justus erat, id est, vir probus ac facilis: ad quem locum <sup>Mattha. i. 19.</sup> Ambrosius ait, non tantum ab ultiōnis atrocitate, sed etiam <sup>x</sup>ab accusationis severitate alienam esse justi personam; sicut et ante Lactantius dixerat, neque accusare quemquam criminis <sup>Inst. Div. vi.</sup> <sub>20.</sub>

gustinus libro ii. de Adulterinis Conjugiis: si autem (quod verius dicitur) non licet homini Christiano adulteram conjugem occidere, sed tantum dimittere. (Cap. 15.)

<sup>x</sup> Locus est in Psalm. cxviii. Serm. 7. cap. v. p. 1473 d. Ed. Paris. 1560. J.B.

<sup>x</sup> Ab accusationis severitate] Vide Hincmarum de Divortio ad interrogacionem v. in fine. c. laicos. caus. 2. quest. 7. et ibi Panormitanum. Gail. de Pace Publica VIII. 3. Adde c. Accusasti, de accusationibus, ita ut est apud Brocardum.

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this. An Action for contumely (such as Christ indicates in speaking of one striking us on the cheek), Musonius said he would neither promote nor authorise, it being better that such things should be pardoned.

7 But if such forbearance bring great peril, we are to be content with such precaution as shall do the least harm to the offender. So among the Jews, the person offended accepted a pecuniary fine; which was also practised at Rome. So Joseph, the husband of Mary, and the educator of our Lord Jesus, when he conceived his wife to be guilty of adultery, was minded to put her away, not to bring her before a public tribunal; and this, because he was a just, that is, a merciful man. And on this account Ambrose and Lactantius praise him. So Justin, of the accuser of the Christians,

*Apol. ii. p. 44. justo licebit. <sup>7</sup>Justinus de Christianorum accusatoribus agens : nolumus, ait, eos puniri, qui in nos calumniantur. Sufficit illis sua pravitas et rerum bonarum ignorantia.*

8 Restant poenæ quæ non privato, sed publico bono consulunt: partim tollendo aut coërcendo nocentem ne cui noceat, partim deterrendo alios severitate exempli, quas non sublatas a Christo certissimo arguento alibi probavimus, quod cum sua daret præcepta simul testabatur se nihil legis tollere. Lex autem Mosis, quæ in his rebus, quamdiu stabat respublica, stare debebat, magistratibus rigide imperabat ut homicidia et alia quedam crimina punirent: Exod. xxi. 14; Num. xxxv. 31, et seqq.; Deut. xix. 13. Quod si Christi præcepta consistere potuerunt cum lege Mosis <sup>7</sup>quatenus supplicia etiam capitalia irrogabat, <sup>8</sup>possunt et cum humanis legibus divinam hac in parte imitantibus consistere.

XI. 1 Sunt qui ut contrariam sententiam tueantur adferunt summam Dei lenitatem in novo federe, quæ proinde hominibus, etiam magistratibus ut Dei vicariis, sequenda sit: quod aliquatenus verum esse non negamus, sed non tam late

<sup>7</sup> *Justinus*] Eiusdem est: μηδὲ μικρὸν δμείβεσθαι μηδένα βουλόμενοι, ὡς ὁ καὶ νὸς νομοθέτης ἐκέλευσεν ne minimū quidem ulciisci quenquam volentes, ut novus legis conditor præcepit. (*Dialog. cum Tryphon. pag. 182. Ed. Sylb.*)  
Adde quæ infra § 16.

<sup>8</sup> *Quatenus supplicia etiam capitalia*

*irrogabat*] Pharisæorum circa poenas ἀπιείκειαν prædicat Josephus (*Antiq. Jud. Lib. XIII. cap. xi. § 6.*) Hinc tot legum ad publicas poenas pertinentium exceptions, et illud, ut ubi omniuo mors inferenda est, inferatur quam leuiissime: quod est in Talmude titulo Ketuboth.

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says, We do not wish our calumniators to be punished: their depravity and ignorance are punishment enough.

8 There remain punishments which provide, not for private but for public good; partly by coercion of the mischievous, partly by the effect of example. And that these are not taken away by Christ, we have elsewhere clearly proved, in that while he gave his precepts, he declared that he did not destroy the Law. The Law, as long as it continued, rigidly required the magistrates to punish homicide and some other crimes. And if the precepts of Christ could stand along with the law of Moses when it pronounced even capital punishments, they may also stand along with human laws, which in this respect imitate the Divine Law.

XI. 1 There are some, who in defense of the contrary opinion, adduce the great mercy of God in the New Covenant, which they conceive must be followed by men, and even by magistrates, as the vicars of God: and that this is in some degree true we do not deny;

patet quam illi volunt. Nam Dei ingens misericordia in novo federe patefacta præcipue spectat peccata contra primævam legem, aut etiam contra legem Mosis commissa ante acceptam Evangelii notitiam, Actor. xvii. 30; Rom. ii. 25; Actor. xiii. 38; Hebr. ix. 15. Nam quæ postea committuntur, præsertim si adsit contumacia, comminationem habent <sup>b</sup>judicii multo severioris, quam illud fuit quod per Mosem est institutum, Hebr. ii. 2, 3, x. 29; Matth. v. 21, 22, 28. Neque vero in altera tantum vita, sed et in hac ipsa in tales culpas Deus non raro animadvertisit, 1 Cor. xi. 30. Ac talium facinorum indulgentia non solet impetrari, <sup>c</sup>nisi ipse homo de se quasi pœnas exegerit, 1 Cor. xi. 31, gravi quodam mœrore, 2 Cor. ii. 7.

2 Urgent iidem saltem pœnitentia ductis dandam impunitatem. Sed ut omittam de vera pœnitentia hominibus vix esse ut constet, nec quemquam non impune sua malefacta latrurum, si eam quovis modo profiteri sufficiat, Deus ipse non semper pœnitentia ductis omnem remittit pœnam: quod vel Davidis exemplo appetit. Sicut ergo pœnam legis, id est mortem vio-

<sup>a</sup> Possunt et cum humanis legibus, divinam hac in parte imitantibus, consistere] Augustinus questionum evan-

gelicarum libro i. questione x.  
<sup>b</sup> Judicii multo severioris quam illud fuit quod per Mosem est institutum]

de jejunio.

<sup>c</sup> Nisi ipse homo de se quasi pœnas exegerit] Peccator ante veniam deflere s: debet. Tertullianus de Penitentia, (c. 6.) Ambrosius in Psal. xxxvii. Chrysostomus in 1 ad Corinthios Hom. xxviii, et in Matthæum Hom. xlii. Adde 2 Cor. vii. 9 et 10.

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but it does not extend so far as they wish. For the great mercy of God in the New Covenant especially regards offenses against the primeval law [given to Adam], or the law of Moses, committed before the knowledge of the Gospel was received. [See the passages quoted.] For transgressions committed after this, especially if there be added contumacy, have a threatening of a much more severe judgment than that which was instituted by Moses. [See the passages.] And not in another life only, but in this also, God frequently punishes such transgressions. And such offenses are not commonly pardoned except man punish himself, by serious contrition, 1 Cor. xi. 31, 2 Cor. ii. 7.

2 They urge that at least they who are penitent ought to receive impunity. But, not to say that true penitence is a matter of which men can hardly be assured, and that any one may obtain impunity if it be sufficient to profess penitence in any way he chooses; God himself does not always remit the whole of the punishment to those who are penitent, as appears by the example of David. As therefore

<sup>Synec. Epist. 44.</sup> lentam aut alioqui immaturam, remittere potuit Deus, ita ut non levibus malis afficeret eum qui deliquerat, <sup>d</sup>sic nunc quoque potest pœnam remittere mortis æternæ, atque interim peccatorem aut morte immatura ipse punire, aut velle etiam ut sic per magistratum puniatur.

<sup>Lib. i. de Ira. c. 16. Ita id. c. 15.</sup> XII. 1 Rursum alii hoc accusant, quod cum vita simul spatium ad pœnitendum præciditur. Sed sciunt hujus rei a piis magistratibus summam haberi rationem, nec quemquam ad supplicium rapi, nisi dato tempore quo peccata sua agnoscere ac serio detestari possit; <sup>e</sup>qualem pœnitentiam, etiamsi opera morte interclusa non sequantur, acceptam Deo esse posse, latronis cum Christo crucifixi exemplum probat. Quod si dicatur vitam longiorem ad magis seriam resipiscentiam prodesse potuisse, responderi poterit, inveniri interdum, quibus merito dici possit <sup>f</sup>illud Senecæ: *quod unum bonum tibi superest, reppresentabimus mortem: ut et illud ejusdem: quo uno modo possunt desinat mali esse;* quod Eusebius philosophus dixerat; *επειδὴν οὐχ οἶον τε ἀλλως καὶ τούτῳ γε οὖν τῷ τρόπῳ*

<sup>d</sup> Sic nunc quoque potest pœnam remittere mortis æternæ, atque interim peccatorem aut morte immatura ipse punire] Hieronymus in cap. i. in Nahum, qui locus relatus est in c. 6. causeæ xxiii. questionem 5. Agathias, Lib. v. ex Platone. (Cap. 2.)

<sup>e</sup> Qualem penitentiam etiamsi opera morte interclusa non sequantur] Hieronymus ad Damasum, citatus in c. importuna, 58. *de penitentia*, dist. 1.

<sup>f</sup> Illud Senecæ] Cujus et hoc est *de Beneficiis*, vii. 20. *ingenitis talibus vita exitus remedium est, optimumque est*

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God could remit the punishment of the law, that is, violent or untimely death, and yet inflict evils not at all slight upon the offender; so now also, he may remit the punishment of eternal death, and yet give up the offender to untimely death, either inflicted by himself, or, in conformity with his will, by the magistrate.

XII. 1 Again, others use this argument, that when life is taken, the time for penitence is cut off. But they know that pious magistrates take careful account of this view, and that no one is hurried to capital punishment without giving him time to see and seriously to detest his sins: and that such penitence, although works corresponding do not follow, being intercepted by death, may be accepted by God, the example of the thief crucified with Christ proves. But if it be said that a longer life might have been profitable for a more serious repentance, there may also be found those to whom may deservedly be applied what Seneca says, *The only good thing which you can now furnish is the spectacle of your death:* and again: *Let them cease to be bad men by death, the only way they can.* As Eusebius the philosopher also says, *Since they can do it no other way, let them at least in this*

*ἀπολυθέντες τοῦ ἐνταῦτα δεσμοῦ τῆς κακίας πορίσωνται φυγήν.*

2 Hæc ergo, supra ea quæ operis initio diximus, responsa sunt illis qui supplicia, aut omnia, aut capitalia, sine ulla exceptione Christianis prohibita volunt, contra quam nos Apostolus docet, qui cum regio officio usum gladii inclusisset ut exercitium divinæ ultiōnis, alibi orandum ait, ut reges Christiani fiant, et qua reges sunt, innocentibus sint præsidio: quod, quæ etiam post Evangelium propagatum magnæ partis hominum est improbitas, obtineri non potest, nisi quorundam morte reprimatur aliorum audacia, quippe cum ne sic quidem inter tot cruceſ et supplicia sontium satis tuta sit innocentia.

3 Neque tamen abs re erit Christianis rectoribus, saltem ex parte aliqua, imitandum proponere <sup>¶</sup>exemplum Sabaonis Ægyptii regis, pietatis nomine laudatissimi, a quo capitales poenas in damnationem ad opus mutatas felicissimo successu narrat Diodorus: etiam ad Caucasum gentes quasdam ait <sup>Lib. I. 65.</sup> Strabo: *μηδένα ἀποκτείνειν τῶν ἐξαμαρτόντων τὰ μέγιστα* <sup>Lib. XI. p. 590.</sup>

*obire ei qui ad se nunquam redditurus est:* item: *eadem manu beneficium omnibus dabo: illi reddam, quando ingenii ta-*

*libus vite exitus remedium est.* Ibid. <sup>¶</sup>Exemplum Sabaonis Ægyptii re-

*gis] Imo et Romanorum magna ex*

parte, quorum nemo post legem Porciā mortis aut verberum supplicio affici potuit, nisi perduellis, aut ab ipso populo damnatus. [De Lega Porcia vide Livium, x. 9.]

*escape the bonds of wickedness, and find that refuge.*

2 This then, in addition to what we said at the beginning of the work, is our answer to those who hold that either all punishment, or at least capital punishments, are without exception forbidden to Christians: which is contrary to what the Apostle teaches us, who includes the use of sword in the royal office, as the exercise of divine vengeance; and who elsewhere bids us to pray that kings may be Christian, and, as kings, be a protection to the innocent. And this, seeing the wickedness of great part of men, even after the propagation of the Gospel, cannot be, except, by the death of some, the boldness of others be repressed; since even now, when capital punishments and gibbets are so common, there is scarcely safety for innocence.

3 Still it will not be improper for Christian rulers, at least in some degree, to propose for their imitation the example of Sabaco, king of Egypt, who is reported by Diodorus to have commuted capital punishments for condemnation to the public works, with the happiest success. And Strabo says, that even the peoples about Caucasus pun-

Lib. XII. 1.  
Inst. Orat.

*nemini mortem irrogasse, quamvis pessima merito. Neque spernendum illud Quintilianus: nemo dubitabit, quin, si no- centes mutari in bonam mentem aliquo modo possint, sicut posse interdum conceditur, salvos esse eos magis e republica sit quam puniri.* Notat Balsamo leges Romanas, quæ mortis pœnam irrogabant, <sup>b</sup>a posterioribus Imperatoribus Christianis mutatas plerasque <sup>i</sup>in alia supplicia, quo et acrius damnatis inureretur poenitentia, et magis ad exemplum proficeret pœna diurnior.

Noct. Attic.  
v. 14.

XIII. 1 Ex ea autem quam nos fecimus enumeratione finium pœnæ apparebat nonnihil prætervisum a Tauro philosopho, ex quo ita Gellius: *Quando igitur aut spes magna est ut is qui peccavit citra pœnam ipse se ultro corrigat, aut spes contra nulla est emendari eum posse et corrigi, aut jacturam dignitatis in quam peccatum est metui non necessum est, aut non id peccatum est, cuius exemplo necessario metu succurrendum sit, tum quicquid ita delictum est, non sane dignum esse imponendæ pœnæ studium visum est.* Nam ita loquitur

<sup>b</sup> A posterioribus Imperatoribus Christianis] Vide quæ infra hoc libro cap. xxiv. § 11. vide apud Nicetam Lib. i. (cap. 4) juramentum Isaaci Angeli. Idem Johannis Comneni imperium sine morte cujusquam fuisse ait. (Ibid. cap. ult.) Vide de Zenone Malchum (Excerpt. Legat. Hæschel. pag. 76) et Au-

gustini epistolam CLVIII. et CLIX. ad Marcellinum comitem, citatum c. circumcelliones, 1. causa XXII. quæst. 5. et capitulus sequentibus: et Chrysostomum adversus Judæos, ubi de Caini pœna.

<sup>i</sup> In alia supplicia] Ad opera maxime. Augustinus epistola CLX.: alicui

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ished no crimes with death, not even the greatest. Nor is that of Quintilian to be despised: *None will doubt that if guilty men can be brought to a good way of thinking in any way, as it is granted that sometimes they can, it would be better for the State that they should be preserved than capitally punished.* Balsamon notes that the Roman laws which enacted the punishment of death, were, by the Christian emperors, changed for the most part into other punishments, that both the condemned might be more thoroughly driven to penitence, and their punishment being prolonged, might be more profitable as example.

XIII. 1 But in the enumeration of the ends of punishment by Taurus, it appears that something was overlooked. Gellius thus quotes him: *When therefore there is either great hope that the offender will without punishment correct himself; or, on the other hand, there is no hope that he can be amended and corrected; or, there is no reason to fear that the dignity which is offended will suffer; or, the offense be not such as requires exemplary fear to correct it; then the offense does not seem to be one for which a punishment need be devised.* For he speaks as if when one end

quasi uno fine sublato tollatur pena, cum contra omnes cessare oporteat ut pœna locus non sit. Deinde illum finem omittit, cum homo inemendabilis vitæ eximitur, ne plura aut graviora peccet: et quod de jactura dignitatis dixit, etiam ad alia damna, quæ metuuntur, extendendum fuit.

2 Melius Seneca cum dixit: *In vindicandis injuriis hæc tria lex sequuta est, quæ princeps quoque sequi debet,* <sup>De Clem. I. 22.</sup> *\*ut aut eum quem punit emendet, aut ut pœna ejus ceteros meliores reddat, aut ut sublati malis securiores ceteri vivant.* Nam hic si per ceteros intelligas, non minus qui læsi jam sunt, quam qui lædi adhuc possunt, plenam habebis partitionem, nisi quod ad illud *sublati* addendum fuit, aut repressis. Nam et vincula et quæcunque est virium deminutio eo pertinet. Minus perfecta est illa alio loco ejusdem Senecæ distributio: *Hoc semper in omni animadversione servabit, ut sciat alteram adhiberi ut emendet malos, alteram ut tollat.* Illud <sup>Lib. I. de Ira. c. ult.</sup> Quintiliani dictum aliquanto etiam imperfectius: *Omnis pena non tam ad delictum pertinet quam ad exemplum.* <sup>Decl. 274.</sup>

*utili operi integra eorum membra deser- viant.* Vide et Nectarii epistolam ad Augustinum, quæ est cci.

*\* Ut aut eum quem punit emendet, aut ut pena ejus ceteros meliores reddat]* Hæc duo etiam Philo posuit in legatione: ὅτι καὶ οἱ κόλασις νοοθετεῖ καὶ σωφρονίζει πολλάκις μὲν καὶ τὸν ἀμαρτάνοντας εἰ δὲ μὴ πάντας γοῦν

τοὺς πλησιδέουντας. αἱ γὰρ ἑτέρων τι- μωρίαι βελτιοῦσι τὸν πολλοὺς φόβον τοῦ μὴ παραπλήσια παθεῖν' ρενατερε corrigit et emendat etiam eum qui pecca- vit: quod si id non eveniat, certe alios quorum ad notitiam pervenit: multis enim meliores faciunt aliena supplicia paris mali formidine, (pag. 992 B.)

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of punishment is taken away, the punishment should be removed; while on the other hand, all the ends must cease to exist in order that there may be no ground for punishment. And moreover he omits that end, when a man who is unamendable is removed from life, that he may not commit more or greater crimes: and what he says of loss of dignity, is to be extended to other evils which are to be feared.

2 Seneca spoke better when he said: *In punishing wrongs, the law has had these three objects, which the prince also ought to aim at; either to amend him who is punished; or to make others better by the punishment; or to make the rest of mankind more secure by removing the bad.* For here, if by the rest, he means not only those who have been injured, but others who may hereafter be so, you have a complete division of the subject, except that to removing you should add or repressing. For both imprisonment, and any other way of diminishing their power, tends the same way. He has another less perfect partition in another place; as has Quintilian.

XIV. Ex his quæ dicta sunt hactenus colligi potest quam non tutum sit Christiano homini privato, sive sui, sive publici boni causa, <sup>1</sup> poenam sumere de improbo quoquam, præsertim capitalem, <sup>2</sup> quanquam id jure gentium nonnunquam permitti diximus: unde laudandus est mos eorum populorum apud quos navigaturi instruuntur mandatis a publica potestate ad perse- quendos piratas, siquos in mari repererint: ut data occasione uti possint, non quasi ausu suopte, sed ut publice jussi.

XV. Cui non dissimile est quod multis in locis receptum est, <sup>3</sup> ut ad accusations criminum non admittantur quibus id libet, sed certi homines quibus id muneric publica potestate impositum est: ut nihil quisquam faciat ad alienum sanguinem fundendum, nisi officii necessitate. Huc spectat Eliberinæ Synodi canon: *delator si quis exstiterit fidelis, et per delationem ejus aliquis fuerit proscriptus vel interfectus, placuit eum nec in fine accipere communionem.*

XVI. Sed et illud simul ex antedictis intelligitur, minime consultum esse homini vere Christiano, ac ne ipsum quidem

<sup>1</sup> *Poenam sumere de improbo quoquam*] Vide quædam supra posita Lib. I. c. iii. § 3.

<sup>2</sup> *Quanquam id jure gentium nonnunquam permitti diximus*] Hoc capite, § 8.

<sup>3</sup> *Ut ad accusations criminum non*

*admittantur]* Chrysostomus de *Pænitentia* VIII. Καλὸν μὲν οὖν, δύορ εἰπον, καὶ τὰς χρηματικὰς δίκαιας φθάνεις διαλύσσει φιλικαῖς, ἵνα πρὸς τῷ τέλει τῆς δίκης κυβερνήσῃ τὸν φίλον. ἐγκληματικὰς δὲ μηδὲ διαλύσσει γένοιτο, ἀλλὰ μηδὲ τὴν ἀρχὴν ἐγγυμνᾶξειν ὅρτισμα

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XIV. From what has been said, it may be collected, how unsafe it is for a private Christian man to inflict punishment, and especially capital punishment, either for the sake of his own or of the public good, upon a guilty person; although, as we have said, that is sometimes permitted by the Law of Nations. And hence we must approve of the usage of those peoples by whom navigators are provided with commissions from the public power to suppress pirates, if they find any upon the seas; on which commissions they may act, not as of their own motion, but by public command.

XV. Of much the same kind is the provision which prevails in many places, that not any body who chooses can take up the accusation of crimes, but only certain persons on whom that office is imposed by the public power; so that no one shall do any thing to shed the blood of another, except by the necessity of his office. Accordingly the canon of the Council of Seville provides, that if any one of the faithful shall turn informer, and by his means any one shall be proscribed or put to death, he shall not receive the Communion, even when dying.

decere, "ut ad munera publica, quæ de sanguine judicium habent, sua sponte se ingerat, jusque vitæ ac necis in cives sibi tanquam omnium excellentissimo et Deo cuidam inter homines deferri æquum existimet ac profiteatur. Nam certe quod Christus monet periculosum esse de aliis judicare, quia quale *Matt. vii. 1.* judicium in alios ferimus, tale nobis in paribus causis a Deo sit exspectandum, omnino hoc etiam pertinet.

XVII. 1 Quæstio est non ignobilis, an leges humanæ quæ interfectionem quorundam hominum permittunt, interfectoribus jus verum præstent etiam apud Deum, an tantum inter homines impunitatem. Posterius hoc Covarruviae et Fortunio placet, quorum sententia adeo displicet Ferdinando Vasquio ut nefandam vocet. Dubium non est, ut alibi quoque diximus, utrumvis legem facere posse in certis casibus. Utrum autem voluerit, partim ex verbis legis, partim ex materia intelligendum est. Nam si dolori lex indulget, pœnam humanam tollit, non vitium, ut in marito qui adulteram uxorem <sup>P</sup>aut adulterum occidit.

Itaque, ut dixi, etiam privatas lites antevertere benignis transactionibus, ut amicum dirigas ad id quod lites sibi propositorum habent: publicorum autem judiciorum accusationes non dicam transigendo abrumpere, sed nunquam eas incipere. (Tom. vi. pag. 806.)

<sup>o</sup> Ut ad munera publica, quæ de sanguine judicium habent, sua sponte se ingerat] An sapienti capessenda sit respublica vide Senecam de otio sapientis.

<sup>p</sup> Aut adulterum occidit] Vide Augustinum de Civitate Dei citatum e. quicunque, 33. causa xxiiii. questione 8.

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XVI. And this too follows from what has been said, that it is not advisable for a truly Christian man, nor is even decent, that he should of his own accord mix himself with public business which involves capital punishment, and seek for a power of life and death, as if he were a sort of God among men. For certainly what Christ says, applies here, that it is dangerous to judge others, since as we judge them, God will judge us.

XVII. 1 It is a noted question, whether the human laws, which permit the slaying of certain men, really justify the slayers in the sight of God, or only give them impunity among men. Covarruvias and Fortunius hold the latter, which opinion Vasquius calls shocking. It is not doubtful, as we have said, that, in certain cases the Law can do both the one and the other. But whether the law had that intention, is to be understood partly from the words of the law, and partly from the matter. For when the law gives indulgence to human feeling, it takes away the punishment of the law, but not the sin, as in the case of a husband who kills the adulterous wife or the adulterer.

Covar. de  
Matr. Part. 2.  
o. 7. n. 19.  
Port. Tract.  
de uit. fin.  
leg. illid. 2.  
Vasq. I. IV.  
cont. id. c. 8.

2 Si vero periculum respicit futuri mali ex dilatione pœnæ, censenda est jus ac potestatem publicam privato concedere, ita ut jam privatus non sit.

Hujus generis est lex illa in Codice Justiniane sub rubrica, quando liceat unicuique sine judice se vindicare vel publicam devotionem, ubi cuicunque licentia datur suppicio subjugandi milites populatorum hac addita ratione: *melius enim est occurrere in tempore, quam post exitum vindicare. Vestram igitur vobis permittimus ultionem, et quod serum est punire iudicio subjugamus edicto, ut nullus parcat militi cui obviare telo oporteat ut latroni.* Et lex subsequens de opprimendis desertoribus: *cuncti, inquiens, adversus latrones publicos desertoresque militiae jus sibi sciant pro quiete communi exercendæ publicæ ultionis indultum.* Huic et illud pertinet Tertulliani: *In reos majestatis et publicos hostes omnis homo miles est.*

3 Atque in hoc differt jus occidendi exsules, quos banitios vocant, ab istarum legum specie, quod ibi præcedit specialis sententia, hic generale edictum, accidente facti evidencia, vim latæ sententiæ obtinet.

[*Sed non sunt verba Augustini, at partim Hieronymi in Ezechiel. Cap. ix. partim alterius ignoti. J. B.*] Et c. inter hæc 6. sequente, causa xxxiii. quæst. 2.

*In reos majestatis et publicos hostes omnis homo miles est]* Agathias Lib. iv.

(in *Orat. Rustici*) οὐ γὰρ στρατηγοῖς μόνοις ἢ τοῖς ἀλλοις δυνατωτάτοις δ τῆς εὐνοίας ἔθλει εκοπός ἐμφύεσθαι, καὶ προστάνειν, ἀλλὰ παντὶ τῷ βουλομένῳ βατὸν δίκουν καὶ προσῆκον τῆς ἐν ἦ τέτακται πολιτείας ὑπεραλγεῖν, καὶ τῷ κοινῇ συνοίσον εἰς δύναμιν κατ-

2 But if the law look to future danger from the delay of punishment, it is to be conceived to give right and public power to the private person, so that he is no longer a private man.

Of this kind is the law in the Codex under the rubric, *When it is lawful for any one without a judge to do justice for himself or for the public service*; [Cod. III. 27] where any one is allowed to suppress by force soldiers who plunder; where too the reason is added, putting such soldiers on the footing of robbers. And a similar law is given respecting deserters. As Tertullian says: *Against traitors and public enemies every one is a soldier.*

3 There is a difference in the right of killing exiles, outlawed persons: namely, that there a special opinion has preceded, but in this case, a general edict, which is combined with the evidence of the fact, and has the force of a judicial sentence.

XVIII. Nunc illud videamus, sintne omnes actus vitiosi tales ut puniri ab hominibus possint. Pro certo habendum est, non omnes esse tales. Primum enim actus mere interni, etiamsi casu aliquo, puta per confessionem subsecutam, ad notitiam aliorum perveniant, puniri ab hominibus non possunt, quia, ut alibi diximus, naturæ humanæ congruum non est ut ex actibus mere internis jus aut obligatio inter homines nascatur. Et hoc sensu accipendum est quod dictant leges Romanae: *cogitationis pœnam neminem mereri.* Id tamen non obstat quo minus actus interni, <sup>\*</sup>quatenus in externos influunt, in æstimationem veniant non sui proprie, sed actuum externorum, qui inde meriti sui accipiunt qualitatem.

XIX. 1 Secundo, puniri ab hominibus nequeunt actus inevitabilis naturæ humanæ. Quanquam enim peccatum esse non potest nisi quod libere fit, ab omni tamen omnino peccato et semper abstinere supra humanam est conditionem, unde cognatum homini esse peccare inter philosophos Sopater, Hie-

*ορθοῦντες non solis ducibus aliisve potentibus innasci solet atque immorari bene agendi propositum, sed cuique volenti et licet et honestum est ejus in qua vivit reipublicæ malis commoveri, et publicas utilitates pro suis viribus promovere.* (Cap. 2.) Vide que supra hoc capite,

### § 9.

<sup>r</sup> *Accidente facti evidencia] Quintilianus declamatione cclx. quedam sunt reipublicæ lœsa, ad quorum pronuntiationem oculi sufficiunt.*

<sup>s</sup> *Quatenus in externos influunt] Ita Sayrus Lib. iii. Thesauri, cap. 6.*

XVIII. Let us now consider whether all vicious acts are such that they may be punished by men. It is certain that they are not all such. For, in the first place, mere internal acts, even if they come to be known, for instance by confession, cannot be punished by men; because, as we have said, it is not congruous to human nature that mere internal acts should give rise to right or obligation. And so the Roman law. But that does not prevent that internal acts, so far as they influence external, may not be taken into account in estimating, not themselves properly, but the external acts which receive from them their character of desert.

XIX. 1 In the next place, acts unavoidable to human nature cannot be punished by man. For though nothing is sin which is not done freely, yet to abstain from all sin and always, is above the condition of humanity; and hence sin is said to be natural to man by some of the philosophers, and by many of the Christians. See Seneca, Sopater, Philo, Thucydides, Diodorus.

*In Avar. Car.* <sup>Pyth. p. 192.</sup> *rocles*, <sup>1.</sup> *Seneca*, <sup>2.</sup> *inter Judæos Philo*, *inter historicos Thucydides*, *inter Christianos plurimi prodiderunt*. *Si puniendus est*, *inquit Seneca*, *cum cumque pravum maleficumque ingenium est*, *pœna neminem excipiet*. *Sopater vero*: ἔως ἂν τις ὡς ἀναμαρτήτους κολάζῃ, τὸ μέτρον ὑπερβαίνει τῆς κατὰ φύσιν ἐπανορθώσεως. *Si quis homines puniat tanquam qui ab omni peccato vacare possint*, *mensuram excedit ejus quæ secundum naturam est correctionis*. *Quod Diodorus Siculus* <sup>12.</sup> *vocat συναδίκειν τὴν κοινὴν ἀνθρώπων ἀσθένειαν*, *injuriū esse adversus communem hominum imbecillitatem*: *alibi*, *τῆς ἀνθρωπίνης καὶ κοινῆς ἀσθενείας ἐπιλανθάνεσθαι*, *oblivisci infirmitatis ejus quæ communis est humano generi*. *Is quem dixi Sopater dissimulanda ait τὰ μικρὰ καὶ συνήθη τῶν ἀμαρτημάτων*, *culpas minores et quasi quotidianas*.

*Lib. xiii. 21.**Lib. xvii. 38.**Pag. 90 A.*

2 Imo dubitari potest an hæc recte et proprie <sup>9</sup>peccata dicantur, cum libertatem quem in specie habere videntur, in sua generalitate considerata, non habeant. Plutarchus *Solone*: δεῖ δὲ πρὸς τὸ δυνατὸν γράφεσθαι τὸν νόμον, εἰ βούλεται χρησίμως ὄλγους, ἀλλὰ μὴ πολλοὺς ἀχρήστως κολάζειν. oportet legem scribi secundum id quod obtineri potest, si

<sup>1</sup> *Seneca*] *Ejusdem est eodem* (*Lib. I.*) *de Ira*, c. 14. *Nemo invenitur qui se possit absolvere*. *Capite 9.* *dixerat*, [immo *Lib. II.*] *inter cetera mortalitatis incommoda et hæc est caligo mentium*, *nec tantum necessitas errandi, sed errorum amor*. *Postea cap. 27.* *quis iste est qui se profitetur omnibus legibus innocentem?* et libro III. c. 26. *omnes mali sumus*. *De Clementia* 1. 6. *Peccavimus omnes: alii gravia, alii leviora, alii ex destinato, alii forte impulsi, aut*

*aliena nequitia ablati: alii in bonis consiliis parum fortiter stetimus, et innocentiam inviti ac renientes perdidimus. Non delinquimus tantum, sed usque ad extremum evi delinquemus. Etiam si quis tam bene purgavit animum, ut nihil turbare eum amplius posset ac fallere, ad innocentiam tamen peccando pervenit*. *Procopius Gotthicorum* III. (cap. xi.) *in oratione Belisarii: τὸ μὲν οὖν μηδ ὄπεσσοῦν ἀμαρτάνειν οὐτε ἀνθράκινον καὶ τῆς τῶν πραγμάτων φύσεως ἔξω· πικῆ*

2 It may even be doubted whether those acts can properly be called sin, which, though they have an appearance of liberty, are not free, when considered in their generality. So Plutarch in *Solon*. Then again there are other acts which are inevitable, not to human nature properly, but to this particular person at this moment, on account of the constitution of the body affecting the mind, or inveterate habit; which is commonly punished, not in itself, but on account of precedent fault; because either the remedies were neglected, or the diseased thoughts willingly admitted into the mind.

XX. 1 Thirdly; those offenses are not to be punished, which neither directly nor indirectly regard human society or any other

*quis velit paucos utiliter, non multos inutiliter punire.* Sunt et quædam non humanæ simpliciter naturæ, sed huic et nunc inevitabilia, <sup>7</sup>ob corporis concretionem in animum transeuntem, aut adultam consuetudinem, quæ tamen puniri solet non tam in sese, quam <sup>7</sup>ob culpam præcedentem, quia aut neglecta sunt remedia, aut ulro attracti in animum morbi.

XX. 1 Tertio, punienda non sunt peccata, quæ nec directe nec indirecte spectant ad societatem humanam, aut ad hominem alterum. Ratio est, quia nulla est causa cur non talia peccata relinquantur Deo punienda, qui et ad ea noscenda est sapientissimus, et ad expendenda æquissimus, et ad vindicanda potentissimus. Quare ab hominibus punitio talis institueretur plane sine utilitate, ac proinde mendose. Excipiendæ hinc sunt pœnæ emendatoriaæ, quæ causam habent ut qui peccavit melior fiat, etiamsi forte id aliorum non intersit. Punendi quoque non sunt actus oppositi virtutibus quarum natura coactionem omnem repudiat, in quo genere sunt misericordia, liberalitas, gratiæ relatio.

2 Tractat hanc quæstionem Seneca, an ingrati vitium <sup>Lib. III. de Ben. c. 6.</sup> impunitum esse debeat; et cur non debeat, adfert multa, sed

*plane delinquere neque hominis est, neque id rerum feri natura.* Adde Basilius Imperatorem cap. 50. (Parænetic. ad Leonem Filium.)

\* *Inter Judæos Philo*] De Mose libro III. p. 675. c. addi potest Abenesdras ad Jobum v. 7. et Rabbinius Israel c. 8.

\* *Diodorus Siculus*] Idem in fragmentis: μή συκοφαντεῖν δύθρωτίν την φύσεων τὴν ἀσθέτειαν non oportet per columniam traducere infirmitatem humanae nature. (E. Lib. xxvi. Eclog. 1.)

\* Merito hoc rejicit et confutat Pu-

FENDORFIUS, *De Jure Nat. et Gent.* Lib. I. cap. v. § 8. J. B.

\* *Ob corporis concretionem in animum transeuntem*] Seneca de Ira libro II. cap. 18. *morum varietates mixtura elementorum facil, et proinde in aliquos magis incumbunt ingenia, prout aliquis elementi major vis abundavit.* Alibi hæc ea vocat, quæ attribuit conditio nascenti et corporis temperatura. Epistola XI.

\* *Ob culpam præcedentem*] Vide c. inebriaverunt. 9. causa xv. quæst. 1.

man. The reason is, that there is no cause why such sins should not be left to God to punish, who can both know them best, and judge them most justly, and punish them most effectually. Wherefore if such a punishment were instituted, it would be useless, and therefore blameable. From this remark are to be excepted punishments for amendment, which have for their object to make the man better, though the interest of others is not concerned. Also punishments are not to be inflicted on acts opposed to those virtues of which the nature rejects all compulsion, as mercy, liberality, gratitude.

2 Seneca treats this question, Whether ingratitude ought to meet

*Idem, cod.  
Lib. c. 7.*

hoc præcipuum, quod et ad alia similia extendi potest: *cum res honestissima sit referre gratiam: desinit honesta esse si necessaria est, id est, honestatis gradum excellentem amittit, quod sequentia indicant: non enim magis laudabit quisquam gratum hominem, quam eum qui depositum reddidit, aut quod debebat citra judicium solvit. Mox: non est gloria res gratum esse, nisi tutum est ingratum fuisse. Aptari ad hujus generis vitia potest illud Senecæ patris in controversiis: b<sup>a</sup>ego reum non laudari desidero, sed absolv*i*.*

**XXI.** Sequitur illud tractemus, an ignoscere aut veniam dare liceat interdum. *Negant enim Stoici, ut videre est in fragmento apud Stobæum, titulo de magistratu, in oratione Tullii pro Murena, et in fine librorum Senecæ de Clementia, Sen. de Clem. li. 7. sed levi argumento. Venia, aiunt, debitæ pœnæ remissio est: sapiens autem quod facere debet facit. Hic fraus latet in illa voce debitæ. Nam si intelligas eum qui peccavit pœnam debere, id est sine injuria puniri posse, jam non*

*\* Nisi tutum est ingratum fuisse] Idem Seneca de Beneficiis i. c. i. Ita demum turpe est non reddere (beneficia nempe) si et licet. Pater Seneca controversiarum v. 34. Dicis mihi, hoc facere non oportet; huic rei estimatio immensa est, itaque nulla vindicta est. Augustinus Lib. ii. c. 83. contra Petilianum: sic igitur quod adversus vos leges constituta sunt, non eis bene facere cogimini, sed male facere prohibemini.*

[§ 184. Edit. Benedictin. ubi legitur: Si qua igitur adversus &c. Sed et locus non videtur recte hoc aptari. J. B.]

*<sup>b</sup> Ego reum non laudari desidero, sed absolv*i*] Est hoc v. contr. 33. simile libro iv. controversia 25. Non speramus, ut probet [Flamininum Judex], sed ut dimittat. Et in Excerptis vi. 8. Multum interest objuges, an punias. Sunt enim quædam ut Cimone ait Plutarchus: ἀλλειμπατα μᾶλλον ἀρετῆς*

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with impunity; and gives many reasons why it ought not [to be punished]; but this as the principal one, which may be extended to other like cases: *Since gratitude is a most graceful thing, if it be necessary it ceases to be graceful: that is, it loses its degree of gracefulness, as appears by what follows: We praise a grateful man only as one who returns a deposit or pays a debt without being forced: and again, It could not be a glorious thing to be grateful except it were safe to be ungrateful.* As Seneca the father says, *I do not want to have [such] a person praised who is accused, but to have him acquitted.*

**XXI.** We must now discuss whether it is ever lawful to excuse or pardon: The Stoics denied it, but with a poor argument: *Pardon is the remission of a due penalty, but the wise man does what is due.* Here the fallacy is in the word *due*. For if you understand that he who has transgressed owes the penalty, that is, may be punished without wrong, it will not follow that he who does not punish him, does

sequetur si quis non puniat, facere quod facere non debet. Si vero ita accipias debitam esse p̄enam a sapiente, id est, omnino oportuisse exigi, dicemus id non semper accidere, ac propterea hoc sensu p̄enam posse esse non debitam, sed licitam tantum. Atque id verum esse potest tum ante legem p̄enalem, tum post eam positam.

XXII. 1 Ante legem p̄enalem constitutam dubium tamen non est quin p̄enæ locus esse possit, quia naturaliter qui deliquit in eo statu est, ut puniri licite possit: sed <sup>d</sup>non ideo sequitur debere eam exigi: quia hoc pendet ex connexione finium, ob quos p̄ena instituta est, cum ipsa p̄ena. Quare si fines illi per se morali aestimatione necessarii non sint, aut alii fines ex opposito occurrant non minus utiles aut necessarii, aut fines p̄enæ propositi alia via obtineri possint, jam apparet nihil esse quod ad p̄enam exigendam præciso obliget. Sit primi exemplum in peccato paucissimis cognito, cuius proinde publica traductio non necessaria sit, aut dam-

*τίνος, ἢ κακίας πονηρεύματα: deliquia magis virtutis alicuius quam ex rito criminis,* (pag. 480 A.)

<sup>c</sup> Negant enim Stoici] Contra eos bene Diodorus Siculus in fragmentis, (E. Lib. xxi. Eclog. 8) συγγνόμη τιμωρίας αἱρετωτέρας νεία melior p̄ena exactiōne. Pro Christianis sententiam dicet Cyprianus epistola l.ii. *alia est philosophorum et Stoicorum ratio, qui dicunt omnia peccata paria esse, et virum gravem non facile flecti oportere.* Inter

*Christianos autem et Philosophos plurimum distat.* (Ep. lv. pag. 107. Edit. Fell. Bremens.)

<sup>d</sup> Non ideo sequitur debere eam exigi] Julianus de Eusebia: οὐδὲ γὰρ εἰ σφόδρα ἐπιτιθέσθαι τινές εἰσι πάσχειν κακὸν καὶ κολάζεσθαι, τούτους ἐκ παντὸς ἀπολέσθαι χρεῖον non enim, siqui sunt meriti male tracturi puniriique, hos perire utique necesse est. (Orat. iii. p. 115 B. Ed. Spanhem.)

not do what he ought. But if you say that the punishment is due on the part of the wise man, that is, that he ought by all means to require it, we deny that that is always the case, and therefore say that the punishment in that sense is not due, but only lawful. And that may be true both before and after the penal law.

XXII. 1 Before the penal law is instituted, it is not doubtful that punishment may have place; because by Natural Law he who has transgressed is in that state in which he may be lawfully punished; but it does not follow that punishment ought to be exacted: because this depends upon the connexion of the ends for which punishment is instituted with punishment itself. Wherefore if those ends are in moral estimation not necessary, or if these are opposed to those other ends not less useful or necessary, or if the necessary ends of punishment can be obtained in another way, it follows that there is nothing which precisely obliges to exact punishment. We may

*Ad Q. fr. Ep. 1, 2. c. 2.* nosa etiam : quo illud pertinet Ciceronis de Zeuxi quodam : *Adductum in judicium fortasse dimitti non oportuerit : conquiri vero ad judicium necesse non fuit.* Secundi in eo qui bene merita aut sua aut parentum repensari digna culpas *De Benef. vi. 6.* opponit : nam, ut ait Seneca, *beneficium supervenientis injuriam apparere non patitur.* Tertii in eo qui verbis emendatus est, aut læso verbis satisfecit, ut ad eos fines poena jam opus non sit.

*Sap. xlii. 19.* 2 Et haec pars una est clementiae a poena liberans : quam respiciens Hebreus sapiens dixit : *δεῖ τὸν δίκαιον εἶναι φιλάνθρωπον justum decet clementia.* Nam quia poena omnis, præcipue gravior, aliquid habet quod per se spectatum non quidem justitiæ, sed caritati repugnet, facile patitur ratio ea abstineri, nisi major ac justior caritas quasi irrefragabiliter obstat. Appositus est ad hanc rem Sopatri locus, cum ait : *τὸ περὶ τὰ συναλλάγματα τῆς δίκης ἐπανορθωτικὸν ἐκφεύγει παντελῶς τὸ τῶν χαρίτων γένος.* τὸ δὲ ἐπὶ τοῖς ἐγκλήμασι κείμενον οὐκ ἀναίνεται τὸ πρᾶον καὶ φιλάνθρωπον τῶν χαρίτων πρόσωπον. *justitiae pars illa quæ contractus ad aequalitatem reducit, omnino respuit omne gratiæ genus : at ea pars quæ circa delicta occupatur, non recusat suavem et blandam gratiarum faciem.* Cujs sensus

<sup>1</sup> Sed in MSS. et optimis Editionibus ita locus esse habet: *Sic beneficium supervenientis INJURIA adparere non patitur.* Quod plane aliud sensum exhibet: et ne quidem secundum lectionem vitio-

sam verba ad rem facerent. *J. B.*

<sup>• Ut in passimi exempli sceleribus]</sup> Josephus: *πατροκτονία κοινὸν ἀδίκημα καὶ τῆς φύσεως καὶ τοῦ βίου, καὶ δὲ μὴ κολαζών ἀδίκεῖ τὴν φύσιν parricidium*

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take an example of the first case in a sin known to few, and of which the public notice is not necessary, or is even hurtful. As Cicero says of a certain Zeuxis, *Being brought to trial perhaps he ought not to be dismissed, but it was not necessary to bring him to trial.* An example of the second case is one who puts forward his own merits or those of his parents, as a set-off against his fault; so Seneca: an example of the third case, we have in him who is reformed by remonstrance, or who has satisfied the injured person by a verbal acknowledgment, so that punishment is not necessary for those ends.

2 And this is one part of the clemency which liberates the offender from punishment, of which the Hebrew wise man says, *Clemency becomes the just man.* For since all punishment has in it something opposed not to justice, but to charity, reason easily permits us to abstain from it, except some greater and juster charity

partem priorem sic expressit Cicero: *Via juris ejusmodi est ad q. fr. 1. 2. quibusdam in rebus, ut nihil sit loci gratiae: posteriorē c. 3.* sic Dion Prusæensis oratione ad Alexandrinos: *χρηστοῦ Pag. 306 c. ἡγεμόνος, συγγνώμη boni præsidis est, ignoscere. Favorino: η̄ καλομένη χάρις παρὰ τοῖς ἀνθρώποις, τοῦτο ἔστιν τινὶ ἀφεσις ἀκριβείας ἐν δέοντι· ea quae dicitur clementia apud homines, est tempestiva relaxatio de summo jure.*

XXIII. Possunt autem tria hæc occurrere, aut ut pena omnino sit exigenda, ut in pessimi exempli sceleribus, aut ut omnino non exigenda, ut si bonum publicum omitti eam exigat, aut ut liceat utrumvis: quo pertinet quod ait Seneca, *De Clem. ii. 7.* clementiam liberum habere arbitrium. Parcit tunc, inquiunt Stoici, sapiens, non ignoscit. Quasi vero nobis non liceat cum vulgo loquendi domino ignoscere vocare, quod parcere illi vocant. Nimirum et hic et alibi, ut Cicero, Galenus atque alii notarunt, magna pars Stoicarum disputationum 'circa voces consumitur, quod philosopho apprime cavendum est. Nam ut verissime dixit scriptor ad Herennium: *vitiōsum est Lib. ii. 28. controversiam intendere propter nominum mutationem:* quod Aristoteles dixerat, *εὐλαβητέον τὸ πρὸς τὸ ὄνομα Topic. i. 14. διαλέγεσθαι.*

XXIV. 1 Major esse difficultas videtur post legem pœ-

*et naturam et vitam humanam violat, ita usum, ut ait Scholiastes Horatii. Augustinus contra academicos: turpe dispecet. (Antiq. Jud. xvii. § 5. Ed. Huds.)*

'*Circa voces consumitur]* Extra manserit. (Cap. 2.)

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oppose insurmountable obstacles. So Sopater, Cicero, Dio Prusæensis, Favorinus.

XXIII. These cases may occur: that punishment may require absolutely to be exacted, as in crimes of very bad example;—or may be fit not to be exacted, as if the public good require it to be omitted;—or either course may be allowable: when, as Seneca says, *Clemency has free will.* Then, say the Stoics, the wise man spares, but does not pardon: as if we might not, with common usage, call that *pardon*, which they call *sparing*. In fact here and elsewhere, as Cicero, Galon and others have noted, a great part of the disputationes of the Stoicks is about words, which a philosopher ought carefully to avoid. So the writer to Herennius and Aristotle say.

XXIV. 1 There seems to be a greater difficulty, after the penal law is instituted; because the author of the law is in a certain

nalem, quia legis auctor aliquo modo legibus suis obligatur; sed hoc diximus verum esse <sup>5</sup>quatenus auctor legis ut pars civitatis spectatur, non qua civitatis ipsius personam atque auctoritatem sustinet. Nam qua talis est potest legem etiam totam tollere, quia legis humanae natura est, ut a voluntate humana pendeat, non in origine tantum, sed et in duratione. Non debet tamen legis auctor legem tollere, nisi probabili de causa, peccatus alioqui in regulas justitiae gubernatricis.

*De Ira Det. c. 19.*

2 Sicut autem totam legem tollere potest, ita et vinculum ejus circa personam aut factum singulare, manente de cetero lege, Dei ipsius exemplo, qui Lactantio teste, *legem cum poneret, non utique ademit sibi omnem potestatem, sed habet ignoscendi licentiam.* <sup>6</sup>Imperatori, inquit Augustinus, *licet revocare sententiam, et reum mortis absolvere et ipsi ignoscere:* causam explicat, *quia non est subjectus legibus qui habet in potestate leges ferre.* Seneca Neronem hoc vult cogitare: *Occidere contra legem nemo non potest: servare nemo praeter me.*

3 Sed hoc quoque faciendum non est nisi causa subsit

<sup>5</sup> Quatenus auctor legis ut pars civitatis spectatur] Vide que supra in textu et notis hoc libro c. iv. § 12.

<sup>6</sup> Imperatori licet revocare sententiam] Symmachus, Lib. x. epist. 63. *Alia enim est conditio magistratum,*

*quorum corruptae videntur esse sententiae si sint legibus mitiores: alia divisorum principium potestas, quos decet acrimoniā severi juris inflectere.* Idem discrimen inter regem et judicem est apud Themistium, oratione v. [Or. xviii.]

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way obliged by his own law; but this, as we have said, is true so far as the author of the law is considered as a part of the State, but not so far as he bears the character and authority of the State. For in that capacity, he may rescind the whole law, because the nature of human law is, that it depends on human will, not only in its origin, but in its duration. But yet the author of the law ought not to abolish it, except for a probable cause, since otherwise he offends against the rules of governmental justice.

2 But as he may take away the whole law, so may he remove its obligation with regard to a particular person or fact, the law for the rest remaining; following the example of God himself, who, as Lactantius says, *when he established the law did not deprive himself of the power of pardon.* So Augustine, and Seneca in the character of Nero.

3 But this also is not to be done except there be a probable cause. What are probable causes, although it cannot be precisely defined, yet we must hold by this, that they ought to be greater

probabilis: quæ autem sint causæ probabiles, quanquam non potest præcise definiri, tenendum tamen est, majores esse debere post legem, quam quæ ante legem spectabantur, quia legis auctoritas, quam servari utile est, ad causas puniendi accessit.

XXV. Causæ autem liberandi aliquem a pœna legis solent esse aut intrinsecæ, aut extrinsecæ. Intrinseca, cum si non injusta, dura tamen est pœna ad factum comparata.

XXVI. Extrinseca, ex merito aliquo, aut alia re commendante: aut etiam spe magna in posterum: quod causæ genus tunc maxime sufficiet, si ratio legis saltem particulariter cesseret in facto de quo agitur. Nam quanquam ad sustinendam legis efficaciam satis est ratio universalis sine repugnantia contrariæ rationis,<sup>1</sup> tamen cessatio rationis, etiam quæ particularis est, efficit ut lex facilius et minore cum damno auctoritatis solvi possit. Id autem maxime usu venit in iis delictis quæ per ignorantiam, quamvis culpa omni non carentem, aut per animi infirmitatem superabilem quidem sed difficuler superabilem, committuntur: ad quæ Christianus homi-

pag. 227, 228. *Ed. Harduin.* Locus, qui tamquam ex Augustino adfertur, non est illius Patris, quamquam millies sub ipsis nomine laudatus, et a multis Auctoribus; sed illius qui *Quæstiones Vet. et N. Testamenti* scripsit, *Quæst. De Fato* 115. Appendix. Tom. III.

Opp. Aug. *Ed. Benedictin.* ]

[<sup>1</sup> Tamen cessatio rationis, etiam quæ particularis est, efficit ut lex facilius et minore cum damno auctoritatis solvi possit] Multa ad hanc rem utilia congesit Gratianus causa i. quæstione 7.

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after the law, than were regarded before the law; because the authority of the law, which it is important to preserve, has been added to the other causes of punishment.

XXV. The causes of liberating any one from the punishment of the law, are commonly either intrinsic or extrinsic: an intrinsic cause is when the punishment, though not unjust, is severe compared with the fact.

XXVI. An extrinsic cause of remission of punishment is that which arises from some merit or other thing commanding the offender to mercy; or from a great hope of him in future; which kind of cause will then be of most avail, if the reason of the law, at least in a particular point, ceases as to the fact in question. For although to sustain the efficacy of the law, the universal reason suffices, there being no repugnant contrary reason; yet the cessation of the reason for the particular case, effects that the law may be more easily, and with less loss of authority, loosened. And this happens most in

num rector maxime respicere debet, ut Deum imitetur, qui in veteri quidem federe multa talia hostiis quibusdam expiari voluit. Levit. iv. et v. at in novo federe verbis et exemplis testatus est se ad talia resipiscentibus condonanda esse facilem. Lucæ xxiii. 34; Hebr. iv. 15, v. 2; 1 Timoth. i. 13. Et quidem illis Christi apud Lucam verbis, *condona illis, Pater, quia nesciunt quid faciant,* <sup>k</sup>adductum Theodosium ut Antiochenis ignosceret, notat Johannes Chrysostomus.

Lib. i. 46.

XXVII. Atque hinc apparet quam male Ferdinandus Vasquius dixerit, justam causam dispensandi, id est lege solvendi, esse eam tantum de qua legis auctor consultus dixisset, extra mentem suam esse eam observari. Non distinxit enim inter *éπιείκειαν*, quæ legem interpretatur, et inter relaxationem. Unde et alibi Thomam et Sotum reprehendit, quod dicant legem obligare etiamsi causa particulariter cesseret, quasi legem esse putassent solam scripturam, quod illis nunquam in mentem venit. Tantum vero abest ut omnis legis relaxatio, quæ sœpe libere et dari et omitti potest, referenda sit ad *éπιείκειαν* proprio dictam: ne illa quidem relaxatio

Lib. i. 26. et  
46.

<sup>k</sup> *Adductum Theodosium*] Historiam vide apud Zonaram. (Lib. XIII. cap. 18. Confer quæ Auctor adfert infra, cap.

xxiv. hujus Libri, § 3. num. 1 in Not.)

<sup>l</sup> *Puniendum nemo est ultra meritum*] Bene hac de re disserunt Mediolanenses

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those offenses which are committed through ignorance, though not free from all fault; or through infirmity of mind, superable indeed, but yet difficultly superable. To these, the Christian ruler ought mainly to look, that he may imitate God, who in the Old Testament gives testimony by word and by deed that he is indulgent in forgiving such. [See the passages.] And that by those words of Christ, *Father, forgive them; for they know not what they do*, Theodosius was moved to pardon the Antiochians, is noted by John Chrysostom.

XXVII. And hence it appears how ill Vasquius said, that a just cause of dispensing with, that is of relaxing the law, was such alone as one about which, if the author of the law had been consulted, he would have said that it was not in his mind to have it observed. Here he has not distinguished between the *equity* which interprets the law, and a relaxation of it. And on this ground he elsewhere reproaches Thomas Aquinas and Sotus, for saying that the law obliges, even though the cause in particular ceases, as if they had thought that the law was only the written word, which never came into their minds. For so far is it from being the case that any relaxation of the law, which may often be freely either given

quæ aut ex caritate aut ex justitia rectrice debetur, eo referri potest. Aliud enim est legem aut probabili aut etiam urgente causa tollere, aliud declarare factum ab initio mente legis non fuisse comprehensum. De tollendis p̄enis vidimus, de taxatione earum videamus.

XXVIII. Ex supra dictis apparet in p̄enis duo spectari, id ob quod, et cujus ergo. Ob quod, est meritum; cujus ergo, est utilitas ex poena. <sup>1</sup>Puniendus nemo est ultra meritum, quo ea pertinent quæ ex Horatio jam ante protulimus; <sup>§ 2. n. 2.</sup> et Ciceronis illud, *est pæna modus sicut rerum reliquarum,* <sup>Epist. xv. ad Brut.</sup> et quædam mediocritas. Ideo p̄enam æstimationis nomine appellat Papinianus. Et Aristides *Leuctrica* secunda humanæ naturæ conveniens esse ait, ut in quoque crimine sit aliquid ultra quod vindicta procedere non debeat. Demosthenes vero, in epistola pro Lycurgi liberis, æqualitatem in poena <sup>p. 114 s.</sup> non ita nude spectandam ait, ut in ponderibus et mensuris, sed expenso proposito ac voto ejus qui deliquit. Intra meriti vero modum magis aut minus peccata puniuntur, pro utilitate.

in oratione quæ apud Guicciardinum est      quæ hoc capite habuimus § 11. et quæ libro xvii. (pag. 387, et seqq.) Confer      habituri sumus libro iii. cap. xi. § 1.

or omitted, is to be referred to *equity*, that even that relaxation which is due to charity or to governmental justice is not to be referred to that principle. For it is one thing to take away the law for a probable, or even for an urgent cause, and another to declare that the fact was from the beginning not comprehended in the mind of the law.

We have spoken hitherto of taking away punishments, let us now consider their apportionment.

XXVIII. From what has been said above, it appears that two things are regarded in punishments; for what, and on account of whom. For what, is a question of merit; on account of whom, is a question of the uso of the punishment. No one is to be punished beyond his desert, as Horace and Cicero say: accordingly, Papinian calls punishment the valuation [of an offense]. Aristides says that it is suitable to nature that there should be some point beyond which punishment shall not proceed; Demosthenes says that equality of punishment [and crime] is not to be regarded nakedly as in weights and measures, but with estimation of the purpose and intention of the offender. Within the limit of this desert, crimes may be punished more or less, according to utility.

Pag. 763 n.

Cap. 5.

*ζορεία τοῦ βίου.* Primum enim membrum voluptatem desideria, secundum habendi cupiditatem, tertium vanæ gloriæ consecrationem et iracundiam complectitur. Philo in Decalogi explicatione omnia mala esse dicit, ἐξ ἐπιθυμίας ή χρημάτων ή δόξης ή ἡδονῆς. Lactantius libro sexto: *virtus est iram cohibere, cupiditatem compescere, libidinem refrænare.* Nam fere omnia quæ fiunt *injuste atque improbe, ab his oriuntur affectibus:* quod et alibi repetit.

XXX. 1 Causa, quæ a delinquendo abstrahere debet, generalis est injustitia. Versamur enim non in quibusvis peccatis; sed in iis quæ respectum habent extra peccantem. Injustitia eo est major quo majus alteri damnum infertur. Ideo primum locum obtinent delicta consummata, postremum quæ ad actus aliquos sed non ad ultimum processerunt: in quibus tanto quidque est gravius, quo ulterius processit. In utrovis genere ea injustitia eminet, quæ communem ordinem perturbat, ac proinde plurimis nocet. Sequitur ea quæ singulos tangit. Maxima hic est quæ vitam: proxima quæ

*[Interdum et aliud accedit vitium]*  
Vide locum insiginem in Lucæ verbis apud Xiphilinum ex Dione. [In Editionibus præcedentibus, loco vocum illarum, *Lucæ verbis*, positum fuerat, *Lucii vita*. Nimirum Editores putaverant ita emendandum locum, quum nescirent quid sibi vellet. Hi tamen simul monere debuerant, quis sit ille *Lucius*, ad cuius Vitam, a Xiphilino scriptam, Auctorem

nos amandare voluerunt. Est quidem heic mendum, sed in sola voce *Lucae*: quod nos detexisse speramus. Nimirum in animo habuit Auctor, quod de *Avidio Cassio* dicit *Marcus Antoninus*, in Oratione ad Milites habita, ubi ea atrociorum esse ejus rebellionem demonstrat, quod violaverit jura amicitiae, φιλίαν ὑπερβάντα. Vide reliqua pag. 277 v. c. Ed. H. Steph. Sensus ille, ut qui-

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hends the desire of pleasure, the second, cupidity of having, the third, the pursuit of vain glory, and anger. Philo says that all evil comes of the desire of wealth, glory, or pleasure. So Lactantius.

XXX. 1 [Second, of the withholding cause.] The general cause which ought to withhold men from offending is justice. [Hence injustice is a measure of punishment.] The injustice is the greater as the greater damage is done to any one. Therefore the first place belongs to consummated crimes; the next, to those which have proceeded to some acts, but not to the last; and among these, everything is the more grievous in proportion as it has gone further. In each class, that injustice has an eminent place which disturbs the common order, and therefore hurts the greatest number; that comes after, which affects individuals. The greatest offense here is that which affects life; the next, family, of which the foundation is matrimony; the last, desirable objects, either directly by subtracting them,

familiam, cuius fundamentum est matrimonium : postrema quæ res singulas expetibiles spectat, sive directe subtrahendo, sive dolo malo causam dando damni.

2 Possunt hæc ipsa subtilius dividi, sed quem indicavimus ordinem Deus in decalogo secutus est. Nam parentum nomine, qui naturales sunt magistratus, etiam alios rectores par est intelligi, quorum auctoritas societatem humanam continet : sequitur interdictio homicidii : deinde matrimonii sanctia, inhibitio adulteriis : tum furta, et falsimoniæ : loco ultimo delicta unconsummata. Inter causas autem abstrahentes non debet poni tantum qualitas ejus quod directe fit, sed et ejus quod secuturum probabile est, ut in incendio et perfusso aggere multorum summæ calamitates et mortes etiam spectandas sunt.

3 Ad injustitiam, quam generalem causam posuimus, interdum et aliud accedit vitium, puta impietas in parentes, inhumanitas in propinquos, ingratus animus in beneficos, quæ augent delictum. Apparet quoque major pravitas <sup>si quis</sup>

videt, omnino ad rem, de qua agitur, facit. Auctor voluerat dicere *in Marci verbis* : sed in cogitatione quadam, orta ex adfinitate nominum familiarium, quibus duo Evangeliste gaudent, vel Auctor ipse, vel Exscriptor, Lucam pro Marco nobis obtulerunt, ut habent Editiones vivo Auctore in lucem emissæ, et illa etiam anni 1646. post obitum ejus prima. J. B.]

<sup>\* Si quis sapienter deliquerit]</sup> Τὸ μὲν γὰρ ἀγνοῆσαι ποτε τὰ κατὰ τὸν βίον δοτῖν ἀνθράκου· τὸ δὲ ἐπὶ τοῖς αὐτοῖς πράγμασι πλεονάκις ἀμαρτάνειν, τέλεον ἔξεστηστος τοῖς λογισμοῖς· ὅπῃ γὰρ πλείστου ἐλαττώμασι περιπεπτώκαμεν, τοσούτα μεῖζον τιμωρίας ἀξιοι τυχεῖν ὑπάρχομεν aliquando ignorasse quod vita erigat, hominis est : al in iisdem rebus sapienter aberrare, emota est

or by producing damage through wrong doing.

2 These matters might be divided more subtilly; but the order which we have indicated is that which God has followed in the Decalogue. [The fifth commandment includes duties to governors]; for by the name of parents, who are natural magistrates, other rulers also must be understood: then follows the interdiction of homicide; then the sanction of matrimony by the prohibition of adultery; then theft; then false witness; in the last place, sins unconsummated.

Among the withholding causes, ought to be put, not only the character of that which is directly done, but of that which will probably follow: as in setting fire to a house, or breaking down a dam, great calamity, and even deaths, are to be looked for.

3 To the injustice which we put as the general cause, there is often added some other vice, as impiety towards parents, inhumanity towards neighbours, ingratitude towards benefactors; which increases the

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sæpius deliquit: quia habitus mali actibus sunt pejores. Et hinc intelligi potest quatenus natura æquum sit quod apud Persas fiebat, ut vita anterior simul cum delicto in estimationem veniret. Id enim locum habere debet in his quibus alioqui non malis subito aliqua peccandi dulcedo subrepit: non in his qui totum vitæ genus immutarunt, in quibus ipse Deus apud Ezechielem nullam se habere ait prioris vitæ rationem, quibusque adeo Thucydideum illud aptari potest: διπλασίας ζημιάς ἄξιοι εἰσιν, ὅτι ἀντ' ἀγαθῶν κακοὶ γεγένηνται· dupliciter pœnas merentur, eo quod ex bonis mali facti sunt. Quod et alibi dixit: ὅτι οὐκ ἐκ προσκόντων ἀμαρτάνουσι· quia ipsos peccare minime decebat.

*Rom. vii. 13.* 4 Itaque optime Christiani veteres in pœnis canonum æstimandis non nudum delictum voluerunt aspici, sed simul vitæ quod præcessit et quod sequitur; ut ex Ancyranæ et aliis Synodis videre est. Sed et lex posita adversus vitium specialem quandam malitiam veteri superaddit: quod ita docet Augustinus: *\*lex prohibens omnia delicta congerimat: non*

*De Ver. Rel. c. 6.* *mentis: quo enim plura sunt in quaæ in-cidimus delicta, hoc majorē pœnam commeremur.* [Diod. Sic. e Lib. xxi. Eclog. 15.]

*\* Ut vita anterior simul cum delicto in estimationem veniret] Asinius Pollio: [apud Senec. Suasor. vi. paullo ante versus Corn. Severi.] *qua major pars vitæ atque ingenii stetit, ea judicandum de homine est.* Cicero pro Sul. *Omnibus in rebus, judices, que graviores maioresque sunt, quid quis voluerit, cogitarit, admiserit, non ex crimine, sed ex**

*moribus ejus, qui arguitur, est pondere-*randum. (Cap. 25.)

*\* Non nudum delictum voluerunt as-  
pici] Canon Ancyranus xxv. Chrysostomus ad ii. ad Corinthios, cap. ii. οὐδεν μανθάνομεν, ὅτι οὐ δεῖ μόνον τὸ δικαίωμα τὸν ἀμαρτημάτων, ἀλλὰ καὶ τὸ δικαίωμα τῶν διάνοιαν καὶ τὴν ἔξιν τῶν ἀμαρτάνοντων τὴν μετάνοιαν δρᾶσσεις unde discimus pœnitentia fines determi-nandas non sola delictorum natura inspecta, sed et propositi et moris eorum qui peccarunt. (Tom. iii. p. 569.) Idem*

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offense. Also there appears a greater gravity, if any one has often offended: because bad habits are worse than bad acts. And hence it may be understood how far that was by nature equitable, which was practised among the Persians, that the anterior life was taken into account along with the offense. That may be applied, where a person, not otherwise bad, has been overcome by some sudden temptation: but not in those who have changed their whole course of life, in whom God says he will not regard the former life (Ezek. xviii. \*). So Thucydides.

4 The ancient Christians, in assigning punishment by the canons,

\* The principal part of the passage rather refers (see v. 10) to the son being bad when the father has been a good man. W.

*enim simplex peccatum est non solum malum, sed etiam vetitum committere.* Tacitus: *si velis quod nondum vetitum est, timeas ne vetere: at si prohibita impune transcederis, neque metus ultra, neque pudor est.*

XXXI. 1 Personæ aptitudo, aut ad considerandas causas avertentes, aut ad suscipiendos affectus incitantes, considerari solet in corporis mixtura, ætate, sexu, educatione, circumstantiis actus. Nam et pueri, et feminæ, et crassi ingenii homines, maleque educati, justi et injusti, liciti et illiciti discrimina minus habent cognita: et in quibus bilis prævalet, iracundi sunt, in quibus sanguis, ad venerem proni; tum vero huc juventus, illuc senectus propendet. Andronicus Rhodius: *φαίνεται τοι-  
νυν ὅτι ἀπολογίαν τινὰ δίδωσι τοῖς αἰσχροῖς, τὸ πεφυκέναι  
πρὸς αὐτὰ, καὶ ἀνεκτότερον ποιεῖ τὸ ἔγκλημα· videtur factis  
turpibus excusationis aliquid adferre natura, et delictum  
efficere tolerabilius.* Metum accedit mali imminentis cogitatione, et iracundiam recens ac needum sedatus dolor, ita ut rationem audiri vix sinant: suntque illorum affectuum delicta

*Paraph. in  
Edu. Nic. vii.  
10. p. 44.*

ii. de Sacerdotio: οὐ γάρ ἀπλῶς πρὸς τὸν παραπτωμάτων μέτρον δεῖ καὶ τὴν ἐπιτιμίαν ἐπάγειν. ἀλλὰ καὶ τῆς τῶν ἀμαρτανόντων στοχάζεσθαι προαιρέσεως, non enim ad solam mensuram delictorum pena imponenda est, sed et inquirendum quis fuerit ejus qui peccavit animus. (Tom. vi. pag. 10.)

\* *Lex prohibet omnia delicta congeriat]* Bene Chrysostomus: ἐνταῦθα οὐ μόνον τιμοτιμίαν δείκνυσι ιουδαῖοι καὶ Ἑλληνοι, ἀλλὰ καὶ πολὺ τὸν Ἰουδαῖον βαρούμενον ἀπὸ τῆς τοῦ νόμου

δόσεως hic non tantum par jus dignitatemque ostendit Judæi et Græci, sed et Judæum hoc ipso prægravari quod legem accepit. (Ad Roman. pag. 32. Tom. III.) Deinde: ὁ γάρ πλείονος ἀπολάύσας τῆς διδασκαλίας, μεῖζον ἀνείη καὶ τιμωρίαν ἀξιος ὑπομεῖναι παρανομῶν.

*Nam qui plus institutiones accepit, is majores etiam contemne legis pœnas meretur.* (Ibid. pag. 30.)

\* Locus iste Taciti, recte expensus, nil ad rem facit. J. B.

rightly directed, not the naked delict to be regarded only, but at the same time the preceding and succeeding life. A law directed against a special sin, if violated, adds a degree of depravity to that which the sin by itself would not have. So Augustine, Tacitus.

XXXI. 1 [Third, as to the aptitude of the person.] The aptitude of the person, either to consider the withholding causes, or to feel the power of the impelling affections, may be considered as to his constitution, age, sex, education, and the circumstances of the act. For children, women, persons of dull intellect, ill educated persons, are less able to perceive the differences of just and unjust, of lawful and unlawful: those in whom bile prevails are irascible; those in whom blood, lustful; and youth tends to one of these ways,

*Nic. vii. 7.* merito minus odiosa quam quæ ex voluptatis nascuntur desiderio, quod et minus efficaciter movet, et differri <sup>yet</sup> et aliam sibi materiam sine injuria quærere facilius potest. Aristoteles *Nicomachiorum* septimo: ὁ θυμὸς φυσικῶτερον καὶ η̄ χαλεπότητος τῶν ἐπιθυμῶν τῶν τῆς ὑπερβολῆς καὶ τῶν μὴ αναγκαίων magis naturale ira et acerbitas quam cupiditas eorum quæ modum excedunt minimeque sunt necessaria.

*Cap. 6.* 2 Omnino enim illud tenendum est, quo animi eligentis judicium magis impeditur, quoque magis naturalibus causis, eo quod delinquitur minoris esse. Aristoteles dicto libro: μᾶλλον ἀκόλαστον ἀν εἴποιμεν, ὅστις μὴ ἐπιθυμῶν η̄ ηρέμα διώκει τὰς ὑπερβολὰς καὶ φεύγει μετρίας λύπας, η̄ τοιοῦτον ὅστις διὰ τὸ ἐπιθυμεῖν σφόδρα. τί γάρ ἀν ἔκεινος ποιήσαιεν, εἰ προσγένοιτο ἐπιθυμίᾳ νεανικῇ, καὶ περὶ τὰς ἀναγκαίων ἐνδειας λύπη ἰσχυρά· minus temperantem dicimus hunc, qui a motu concupiscente aut non tentatus, aut leviter tentatus quærit enormes voluptates aut mediocria incommoda defugit, eo qui vehementi affectu percellitur. Nam quid idem ille facturus fuisse putandus est, si adfuisset juvenilis quædam perturbatio animi, aut gravis dolor ex penuria eorum quibus negatis natura doleat? Quicum convenit illud Antiphonis:

*Apud Stob.  
Tit. 2.*

<sup>1</sup> Et aliam sibi materiam sine injuria quærere facilius potest] Chrysostomus ad Galatas: η̄ ἐπιθυμίᾳ μιξιν ἐπιζητεῖ μόνον, οὐ τοιάνδε μιξιν cupidio concubitum tantum quærit, non hujus aut illius concubitum. (Tom. III. pag. 753.) Tertullianus libro II. ad Uxorem: nam quanto grandis est continentia carnis quæ viduitati ministrat, tanto, si non sustineatur, ignoscibilis videri potest: diffi-

cilium enim facilis est venia. Quanto autem nubere in Domino perpetrabile est, uti nostræ potestatis, tanto culpabilius est non observare quod possis. (Cap. 1.) et mox, quanto potestas vitandi fuit, tanto contumacie criminis oneratur. (Cap. III.) Adde M. Antoninum, loco modo indicato, ubi Theophrasto auctore utitur.

<sup>2</sup> Qui cum sit opulens nequiter quic-

age, the other. Andronicus speaks of such palliations. Then again fear is augmented by the thought of imminent danger; anger, by recent and still smarting vexation; so that they scarce suffer reason to be heard: and transgressions which thus arise are deservedly less odious than those which spring out of the desire of pleasure, which is both slower in its impulses, and may more easily be put off and led to seek other matter. Aristotle discusses this question, *Eth. Nicom.* VII. 7.

2 This also is to be held, that in proportion as the judgment of the person choosing his course is more impeded, and by mere natural causes, the offense is less. So Aristotle in the same place. Anti-

<sup>a</sup>Qui cum sit opulens nequiter quicquam facit,  
Hunc, si esset pauper, quid non facturum putas?

Et quæ in senum amores passim in comediiis legimus. Ex his igitur causis sestimandum meritum intra quod poena consistere debeat.

XXXII. 1 Tenendum autem est quod Pythagorici dicebant, justitiam esse <sup>a</sup>τὸ ἀντιπεπονθός, id est, parem passionem in poenis, id non ita accipi debere quasi qui alteri nocuit deliberato et sine causis culpam valde minuentibus, tantundem documenti nec amplius ferre debeat. Id enim non ita esse ipsa lex, quæ legum omnium perfectissimum exemplar est, ostendit, <sup>Erod. xxii. 1.</sup> cum furtæ quadruplo aut quintuplo vult lui. Et lege Attica <sup>b</sup>ultra dupli condemnationem, per dies aliquot vinctus habebatur, ut Demosthenes in Timocratem nos docet. *Leges*, <sup>Pag. 478 c.</sup> inquit Ambrosius, ea quæ distracta sunt alicui cum *injuria officia. iii. 3.* personæ aut rei ipsius cumulo restitui imperant, quo furem a detrahendo aut poena deterreant, aut mulcta revocent. Aristides Leuctrica secunda: *τοῖς ἐν δικαστηρίοις ἐπεξιοῦσι*, <sup>Tom. II. p. 133 c.</sup> *τοῖς ἀδικήσασι μείζονα ἥ καθ' ἡ πεπόνθασι δέδοται περὶ τῶν νόμων εἰς τιμωρίας λόγον* his qui *judicio illatas sibi injuriās* persequuntur, majora leges permittunt pro vindicta

quam facit] Chrysostomus *de Provin-*  
*dentia IV.* [Immo v. pag. 878. Tom. vi.]  
ώστε ὅταν ἴδῃς τὸν πλούτοντα ἀδι-  
κοῦντα, πλεονεκτοῦντα, ἀρπάζοντα,  
διὰ τοῦτο μάλιστα αὐτὸν στέναξον,  
ἐπειδὲν πλούσιος ὁν ταῦτα ποιεῖ. μεί-  
ζονα γὰρ δίδωσι τιμωρίαν· quare ubi  
dileximus in iustum, avaram, rapa-  
cem, hoc magis eum miserare, quod talia  
dives faciat. Ob id ipsum enim puni-  
etur gravius.

<sup>a</sup> Τὸ ἀντιπεπονθός] Ταυτοτάτεια  
Harmenopulo. (Prompt. Lib. I. Tit. 2.  
§ 34.)

<sup>b</sup> Ultra dupli condemnationem] Al-  
ludit huc locus Apoc. xviii. 6. Reddite  
duplum. Hercules Minyas, qui a The-  
banis sine jure tributum extorserant,  
duplum coegerat eis tributi pendere The-  
banis. Apollodorus Lib. II. (cap. 3.  
§ 11.)

phanes; and old men in love, in comedies. And by these principles we must estimate the limiting amount of punishment according to desert.

XXXII. 1 We must remark that the doctrine of the Pythagoreans, that justice is a reciprocal proportion, is not to be so understood as if he who has deliberately and without extenuating causes, injured another, should himself receive so much harm, and no more. That this is not so, the Hebrew law shews, when it directs thefts to be punished by forfeit to four or five times the amount. By the Attic Law, the thief, besides a fine of the double, was kept in bonds some days. So Ambrose, Aristides, Seneca.

*exigere, quam quæ ipsis acciderant.* Seneca de judicio post hanc vitam :

Scelera taxantur modo

Majore nostra.

LIB. XV. p.  
710.

LIB. I. 34.

Deut. xix. 19.

Pag. 789 n.

2 <sup>c</sup> Apud Indos, ut Strabo notat, qui quem mutilasset, supra talionem, manu truncabatur. Et in *Magnis Moralibus* quæ Aristotelis nomen præferunt, legimus: *οὐ δίκαιον, εἴ τις τὸν ὄφθαλμὸν ἔξεκοψέ τινος, ἀντεκκοπῆναι μόνον, ἀλλὰ πλείονα παθεῖν· justum est si quis oculum alteri effoderit, non tantundem modo, sed et amplius patiatur.* Nec enim æquum est ut par sit periculum innocentis et nocentis, ut recte ostendit <sup>d</sup>Philo, quo loco de homicidii pena tractat. Atque hoc inde quoque estimari potest, quod delicta quædam <sup>e</sup>non consummata, et ideo consummatis minora, nocumentum infligant par cogitato, quod in lege Hebræa <sup>f</sup>de falso teste proditum, et in lege Romana de eo qui hominis occidendi causa cum telo ambulavit. Cui consequens est ut perfectis criminibus major respondeat pena, sed quia morte nihil est gravius, eaque iterari non potest, ut Philo notat dicto loco, ideo intra eam

<sup>c</sup> *Apud Indos]* Apud Indorum alios furtum morte punitum notavit Nicolaus Damascenus.

<sup>d</sup> *Philo]* Secundo de *Legibus Speci-  
alibus*, (pag. 789. et seqq.)

<sup>e</sup> *Non consummata, et ideo consum-  
matis minora]* Plinius de leone: *Vul-  
neratus observatione mira percussorem  
noscit, et in quantilibet multitudine ap-  
petit. Eum vero qui telum quidem misc-*

2 Among the Indians, as Strabo notes, he who had maimed any one, besides retaliation, had his hand cut off. In Aristotle's *Magna Moralia*, *If any one strike out the eye of another, it is just that he suffer not so much only, but more.* For it is not just that the danger of the guilty and of the innocent should be the same, as Philo shews, in treating of the punishment of homicide. And this may be estimated also by considering that some delicts not consummated, and therefore less than if they were consummated, bring down, as punishment, an evil equal to that meditated: as we read of the Hebrew law of false witness, and the Roman law against him who went about with a weapon to kill a man. From which it follows, that to the crime when consummated, a heavier punishment will correspond: but because nothing is heavier than death, and that cannot be reiterated, as Philo notes, the punishment is necessarily confined within those limits, sometimes adding tortures according to the desert.

XXXIII. But the magnitude of the punishment is to be regarded, not nakedly only, but with respect to the patient. For the fine which will press down a poor man will sit lightly on a rich one: and to a

necessario consistitur, additis tamen interdum pro merito cruciatibus.

XXXIII. Pœnæ autem magnitudo non tantum nude spectatur, sed cum respectu ad patientem. Nam multa eadem pauperem onerabit, divitem non onerabit: et vili ignominia leve erit malum, honorato grave: quo genere diversitatis sœpe utitur lex Romana: unde harmonicam proportionem extruxit Bodinus, cum tamen revera simplex hic sit et qualis in numeris <sup>Lib. vi. de Rep. c. ult.</sup> sœqualitas, meriti ad pœnam, sicut in contractibus mercis ad nummos, quanquam alibi merx eadem plus, alibi minus valet, itemque nummi. At fatendum, sœpe in lege Romana id non fieri *ἀνευ προσωποληψίας*, id est sine nimio personarum et qualitatum ad factum non pertinentium respectu, a quo vitio longissime semper abest lex Mosis. Et hæc quidem, ut diximus, intrinseca est pœnæ taxatio.

XXXIV. Sed intra concessum modum ad minimum dicit caritas ejus qui punitur, nisi plurium justior caritas aliud suadeat ob causam extrinsecam, quæ interdum est ingens periculum ab eo qui deliquit, plerumque autem necessitas exempli.

*rit, sed tamen non vulneraverit, correp-tum raptatumque sternit, nec vulnerat.* (*Hist. Nat. VIII. 16.*)

*' De falso teste proditum]* Et de eo qui uxorem stupri insimulavit, ut dotem

lucraretur. *Deut. xxii. 19.* Et de eo qui ceteroqui ex causa injusta aliquem in judicium deduxerit, alienum sibi vindicantis. *Exod. xxii. 9.*

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disreputable person, ignominy as a punishment will be a small evil, but a great one to a man in honour. The Roman law often uses this kind of diversity; whence Bodin constructed his harmonic proportion: although in reality the proportion is simple, and resembles numerical equality: the punishment is to be equal to the desert, as, in contracts, the money to the goods: although the same goods are in one place worth more, in another less, and money in like manner. But it must be confessed that this, in the Roman law, is often not done without too much respect of persons and qualities not pertaining to the fact; while the law of Moses is always quite free from this fault. And this, as we have said, is the intrinsic apportionment of punishment.

XXXIV. But a tenderness for him who is punished, leads us to the minimum of punishment, except a juster tenderness for the greater number persuade us to some other course for an extrinsic cause; which cause is, sometimes, great danger from him who has offended, but more frequently, the necessity of example. And this necessity usually arises from the general incitements to sin, which cannot be repressed without sharp remedies. The principal incitements are custom and facility.

Ea autem nasci solet ex generalibus invitamentis ad peccandum, quæ reprimi nisi acribus remedii nequeunt. Invitamenta autem præcipua sunt, consuetudo et facilitas.

XXXV. Ob facilitatem lex divina Hebræis data gravius punit furtum <sup>ε</sup> de pascuo quam de domo, Exod. xxii. 1 et 7, 9.

LIB. II. 2.

Justinus de Scythis : *nullum scelus apud eos furto gravius, quippe sine tecto munimentoque pecora et armenta habentibus quid salvum esset, si furari liceret?* Simile illud in Aristotelis problematis sectione XXIX. οὐκομοθέτης οὐχ ἵκανος ὄντας ἡγησάμενος εἶναι φύλακας, τὸν νόμον αὐτοῖς ἐπέστησεν <sup>λέγει</sup> auctor cum sciret <sup>h</sup> illis in locis dominos res suas custodire non posse, custodem legem addidit. Consuetudo facti etsi aliquid detrahit de culpa (*non sine ratione veniam dedit*, inquit Plinius, *facto vetito quidem, non tamen inusitato*) pœnæ tamen acrimoniam ex aliqua parte flagitat: quoniam ut Saturninus loquitur, *nimium multis grassantibus opus exemplo est*. Sed in judiciis magis illud, in legibus hoc sequendum est, ratione habita temporis quo leges aut judicia feruntur: quia pœnæ utilitas magis in universalitate spectatur circa quam sunt leges: culpa autem major aut minor est in singulis.

LIB. IV. EP. 8.

D. DE PEN.

<sup>ε</sup> *De pascuo quam de domo*] Vide Maimonidem Directore III. 41. Cicero pro Sexto Roscio Amerino: *atque ea sunt animadvertenda peccata maxime, que difficillime præcaventur.* (Cap. 40.)

<sup>b</sup> *Illis in locis*] In balneis: morte plectebantur Athenis fures balneari, si estimatio esset major decem drachmis. Demosthenes contra Timocratem. Adde I. 1. D. de furibus balneariis. [Lex Solonis exstat pag. 476 c. Orationis Demostenica: sed in illa agitur tantum de iis qui furabantur in Gymnasiis aut

Portibus. Diximus plura in Notis Gallicis. J. B.]

<sup>1</sup> *Supplicia meritis minora*] Justin. II. Hunnis scribens, Πωμαλοὶ ἔρεστι μή ἀντιτίθενται τὰς τιμωρίας λοιρρότους τοὺς πλημμελήμασι: Romanis mos hic est, non irrogare pœnas pares peccantium merito. [In Elogiis Legationum, ex Menandro Protectore, pag. 131. Ed. Hæschel. ubi Justinus non scribit Hunnis, sed presens loquitur Legatis Bajani Regis Avarum. J. B.]

<sup>6</sup> Nullibi exstat talis sententia in

XXXV. On account of the facility, the divine law given to the Hebrews punishes more heavily theft from the field than from the house; Exod. xxii. 1 and 7. So Justin says the Scythians account theft a most heinous crime, in consequence of its facility among their uninclosed herds. So Aristotle.

The custom of an act, though it subtracts something from the fault (so Pliny), yet on one side it demands severity, to meet the prevailing evil. But in particular judgments, we must more lean to leniency, in making laws, to severity; taking account of the time when the laws or the judgments are delivered, because the utility of the punishment

XXXVI. 1 Quod autem diximus, ubi magnæ urgentesque causæ cessant, ad minuendam potius pœnam promptos nos esse debere, in eo clementiæ pars altera sita est. Nam priorem in tollenda pœna collocavimus. *Quia difficile est temperamentum*, inquit Seneca, *quidquid æquo plus futurum est in partem humaniorem præponderet*. Alibi : *pœnam si tuto poterit, lib. I. de cl. c. 2.* *donet, sin minus, temperet*. Et apud Diodorum Siculum lau- *Ibid. c. 20. BVL. I. 70.*  
 datur rex Ægyptius, quod imponeret τιμωρίας ἐλάττους τῆς αἰξίας, <sup>Cap. 24.</sup> *supplicia meritis minora*. De M. Antonino Capitolinus : *erat mos iste Antonino, ut omnia crimina minore sup-* <sup>Ad Nic. p. 19D.</sup> *plicio, quam legibus plecti solerent, puniret*. Isæus <sup>5</sup> quoque orator dixit, oportere leges quidem constitui rigidas, sed <sup>1</sup> pœnas exigi legibus mitiores. Et Isocratis est monitum : *τὰς τιμωρίας ἐλάττους ποιεῖσθαι τῶν ἀμαρτανομένων ut pœne infligantur infra peccati modum*.

2 <sup>1</sup>Augustinus comitem Marcellinum sic admonet sui officii : *michi sollicitudo maxima incussa est, ne forte sublimitas tua censeat eos tanta legum severitate esse plectendos, ut qualia fecerunt, talia patiantur, ideoque bis literis obtestor*

Orationibus Isæi, quæ circa controversias civiles omnes versantur. Aut valde fallor, aut habet hoc Auctor noster e Notis FRIDERICI LINDENBROGI, qui ad Ammianum, **xxviii. 1.** simul cum locis Capitolini et Isocratis hec laudatis, tamquam ex Isæo addit verba sequentia : Χρή τὸν νόμον μὲν τιθεσθαι σφοδρῶς, πρατέρως δὲ κολάζειν, η ὡς ἔκεινος κελεύουσι. Post primam Editionem locum reperi apud STOBÆUM, Serm. **XLIV.** seu de Regno, pag. 327. *J. B.*

<sup>2</sup> *Pœnas exigi legibus mitiores*] Hoc sibi volebat Henricus Imperator sym-

bolo mali Punici, cum dicto : *Subacre. Rex Theodoricus apud Cassiodorum xi. 40. Qui periculose justi sumus, sub securitate semper ignoramus.*

<sup>1</sup> *Augustinus]* Epistola **CLIX.** quæ citatur c. circumcelliones, i. causa **XXIII.** quæst. **v.** Vide, si placet, ad Augustinum eundem epistolam Macedonii, et eam qua respondet Augustinus numeris **LIII.** et **LIV.** Adde de Theodosio juniori quæ sunt in excerptis Johannis Antiocheni ex manuscripto Peirescii, (pag. 850.) Macedonius ad Augustinum : *officium sacerdotis est, intervenire pro reis.*

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is most considered in the general case; but the fault is greater or less in individual cases.

XXXVI. 1 What we have said, that when great and urgent causes cease, we should be prompt rather to diminish the punishment, is the direction in which the other part of clemency is seated: the former part consisting in taking away the punishment altogether. So Seneca speaks of *tempering* punishment when we cannot pardon; so Diodorus Siculus, Capitolinus, describing M. Antoninus, Isocrates, speak of punishment below the requirement of the laws.

2 Augustine admonishes Count Marcellinus of his duty, urging clemency.

*fidem tuam, quam habes in Christo, per ipsius Domini nostri misericordiam, ut hoc non facias, nec omnino fieri permittas.* Cujus est et hoc: *Sic etiam ipsos criminum ultiores, atque in hoc officio non ira propria concitatos, sed legum ministros, nec suarum sed alienarum examinatarum injuriarum vindices, quales judices esse debent, terruit divina censura, ut cogitarent propter sua peccata misericordiam Dei necessariam, nec putarent ad culpam officii sui pertinere, siquid erga eos misericorditer agerent, quorum vitæ necisque haberent legitimam potestatem.*

XXXVII. Speramus nihil a nobis prætermissum, quod ad hujus argumenti satis difficilis et obscuri cognitionem magnopere faciat: nam quatuor illa quæ <sup>m</sup>Maimonides maxime ait spectari in pœnis, magnitudinem peccati, id est damni, frequentiam talium peccatorum, quantitatem concupiscentiæ, et operis facilitatem, ad sua loca retulimus; nec minus illa septem quæ confuse satis in pœnis considerat Saturninus. Nam persona ejus qui fecit ad aptitudinem illam judicandi maxime pertinet, et persona ejus qui patitur interdum aliquid confert ad sestimandam culpæ magnitudinem. <sup>n</sup>Locus injustitiæ culpam aliquam addere solet peculiarem, aut etiam ad facilitatem operis pertinere. Tempus ut diuturnum est aut breve, ita li-

*L. Aut fact.  
16. § 1. D.  
de Pen.*

<sup>m</sup> Maimonides] Lib. III. Directoris, c. 41. Confer c. sicut dignum, 6. de homicidio voluntario vel casuali.

<sup>n</sup> Locus injustitiæ culpam aliquam addere solet peculiarem] Philo Lib. I. de Legibus Specialibus: οὐ γὰρ ταῦτα πατρὶ καὶ ἀλλοτρίῳ πληγὰς ἐμφορῆσαι, οὐδὲ ἀρχοντὶ οὐδιότην κακὸς εἰ-

πεῖν, οὐδὲ ἔργος εσθαί τι τῶν μη ἐφιέμένων ἐν βεβίοις ή ιεροῖς χωρίσι, οὐδὲ ἐν ἑορταῖς καὶ πανηγύρεσι καὶ δημοτελέσι θυσίαις: non idem est patri et extraneo inferre violentas manus: nec idem magistratui et privato maledicere: nec illicitum aliquid patrare in loco profano et sacro, in die festo, in conventu,

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XXXVII. We hope we have omitted nothing important in this obscure and difficult argument. We have taken account of the four things which Maimonides says are chiefly to be regarded in punishments; the greatness of the sin, its frequency, the amount of desire, the facility of the deed; and also the seven points which Saturninus very confusedly considers in punishments; the person who did the deed, the person who suffers, the place, the time, the quality, the quantity, the event;—all the seven belong to one or other of our heads.

XXXVIII. That wars are undertaken not unfrequently to demand punishment, we have shewn above, and history everywhere teaches: but mostly this cause is conjoined with that other, the reparation of the

bertatem judicandi auget aut minuit, interdum et pravitatem animi ostendit. Qualitas partim ad genera appetitum referatur, partim ad causas quæ abstrahere a peccando debebant. Quantitas quoque ad appetitum referenda est. Eventus ad causas abstrahentes.

XXXVIII. Solere pœnæ expetendæ causa bella suscipi, et supra ostendimus et passim docent historiæ: ac plerunque hæc causa altera de damno reparando conjuncta est, quando idem actus et vitiosus fuit et damnum re ipsa intulit, ex quibus duabus qualitatibus due diversæ nascentur obligationes. Non esse autem bella suscipienda ob delicta quævis satis constat: nam ne leges quidem suam illam ultionem, quæ tuto nec nisi nocentibus nocet, omnibus culpis impendunt. Recte, ut modo diximus, Sopater oportere ait, ea quæ minora et vulgaria sunt delicta dissimulari, non vindicari.

XXXIX. 1 Illud autem quod in oratione pro Rhodiensibus a Catone dictum fuit, non esse æquum pœnas quemquam dare ob eam rem quod arguatur male facere voluisse, suo quidem loco non male erat positum, quia nullum populi Rhodiensis decretum adferri poterat, sed animi fluctuantis conjecturæ: universaliter autem hoc recipiendum non est. Nam voluntas quæ ad externos actus processit (internos enim ab

*in sacris publicis.* (Pag. 805 z.) Cum his convenit quod ex Labone adserit Ulpianus l. prætor edixit, 7. in fine D. de injuriis. *Persona atrocior injuria fit, ut cum magistratu, cum parenti, patrono fiat; tempore, si ludis et in conspectu: nam populi Romani in conspectu an in solitudine injuria facta sit, multum interesse ait.* [In hac Lege laudanda Auc-

tor tacite sequitur emendationem rectam (quidquid dicat perpetuus obtrectator Gul. Fornerius, *Select.* 1. 21. et post eum alii prejudicis obsecrati) Summi Cuvaci, qui pro *Prætoris in conspectu, legendum censuit, Populi Romani in conspectu, erroremque ex siglis ortum demonstravit. J. B.*]

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damage, when the same act was both vicious and produced damage: from which two qualities two different obligations arise. That wars are not to be undertaken for every fault, is obvious enough; for even the laws do not apply their vindictive operation to all faults, though they only harm the guilty. This is right, as we have said. So Sopater.

XXXIX. 1 What Cato said for the Rhodians, that it was not just that a person should be punished for the evil which he was alleged only to have wished to do, was not ill put in its own place, because no decree of the Rhodians [declaring war against the Romans,] could be adduced, but only conjectures of a fluctuating mind: but this is not universally to be received. For the will which has proceeded to

hominibus non puniri supra diximus) p̄enis solet esse obnoxia.  
°Seneca pater in controversiis: *scelera quoque, quamvis citra exitum subsederunt, puniuntur. Injuriam qui facturus est jam facit, p̄it alter Seneca.* Non exitus rerum, sed

*De Ira. I. 3.*  
*Cap. 7.*  
*De Offic. I. 11.*  
*Lib. xliii. 30.*  
*Lib. xlv. 24.*

⁹consilia legibus vindicari Cicero dixit pro Milone. Periandri dictum erat: *μὴ μόνον τοὺς ἀμαρτάνοντας, ἀλλὰ καὶ τοὺς μέλλοντας κόλαζε.* Sic Romani censem bellum ineundum cum rege Perseo, nisi satisfaciat de consiliis belli parandi aduersus populum Romanum initis, quia scilicet arma, milites, classem jam comparaverat. Atque hoc ipsum in Rhodiensium oratione apud Livium recte notatur: neque moribus, neque legibus ullius civitatis ita comparatum esse, ut si quis vellet inimicum perire, si nihil fecerit quo id fiat, capit is damnatur.

2 Sed nec omnis perversa voluntas, facto jam aliquo indicata, p̄ena facit locum. Nam si ne perpetrata quidem peccata omnia vindicantur, multo minus cogitata ac copta. In multis locum habet quod Cicero dicit: *haud scio an satis sit eum qui lacesserit injuriæ suæ p̄enitere.* Lex Hebreis data

◦ *Seneca pater]* Excerptorum IV. 7.

¶ *Ait alter Seneca]* Et de Beneficiis libro v. c. 14. *Latro est etiam antequam manus inquiet: quia ad occidendum jam armatus est, et habet spoliandi atque interficiendi voluntatem.* Philo in primo [immo secundo libro pag. 790 c.] de

Specialibus Legibus: *ἀνδροφόνου χρῆ νομίζειν οὐ τοὺς κτείνοντας αὐτὸν μόνον, ἀλλὰ καὶ τοὺς πάντα δρῶντας εἰς τὸ δινεῖσθαι, η φανέρως, η λάθρα, καν μη τὸ ἀδίκημα ὥστιν εἰργασμένοι: homicidas existimari oportet non eos solum qui vitam adimunt, sed et eos qui omnia faci-*

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external acts, is commonly obnoxious to punishment. So Seneca, senior and junior. Not the event of things, but the intent, are treated by the laws, says Cicero. So Periander. So the Romans decreed the second war against king Philip, except he gave satisfaction concerning the designs he had entertained of making war against Rome; inasmuch as he had collected arms, soldiers, and a fleet. And this is noted in the oration of the Rhodians in Livy; that neither is it established by the laws nor by the customs of any nation, that if any one wished his enemy to perish, but did nothing to bring such a result to pass, he should be capitally condemned.

2 But again, it is not every perverse will, which comes to be indicated by a fact, that gives occasion for punishment. For if we do not punish all perpetrated crimes, much less shall we punish those only thought of and conceived. In several places we may say what Cicero says; *I do not know whether it is not enough that the person who has done wrong should repent.* The Hebrew law did not provide specially against most offenses against piety merely preconceived, or even against the life of man (except by means of judicial proceedings);

adversum pleraque delicta inchoata contra pietatem, aut etiam contra hominis vitam extra <sup>6</sup>judicium, nihil speciale constituit: quia et circa res divinas utpote nobis inconspicuas facilis est error, et iracundiæ impetus non indignus est cui ignoscatur.

3 Ceterum in tanta matrimoniorum copia alienas nuptias attentare, aut in tam æquabili possessionum divisione fraudem struere qua cum aliena jactura se quis locupletet, minime erat ferendum. Nam illud, non concupisces, quod in Decalogo est, quanquam si scopum spectes legis, id est, τὸ πνευματικὸν, latius patet, (<sup>7</sup>vellet enim lex, omnes etiam mente esse purissimos) tamen ipsum præceptum externum, ἐντολὴν σαρκικὴν, quod attinet, ad motus animi pertinet qui facto produntur, quod aperte liquet ex Marco Evangelista qui idem illud præceptum extulit, μη ἀποστερήσῃς: idque cum jam ante posuisse, μὴ κλέψῃς: atque eo sensu vox Hebræa et ei respondens Graeca reperiuntur tum Mich. ii. 2, tum alibi.

4 Inchoata ergo delicta armis vindicanda non sunt, nisi et res sit gravis, et eo processum sit ut ex tali actu certum

*unt palam aut clam ut quenquam interimant, etiamsi facinus ipsum nondum commiserint.*

<sup>9</sup> *Consilia legibus vindicari]* Valesius Maximus de Cn. Sergio Silo damnato ob nummos matrifamiliae promisso: *non factum tunc sed animus in questionem deductus est, plusque voluisse pec-*

*care nocuit, quam non peccasse profuit.*  
(Lib. vi. cap. i. num. 8.)

<sup>8</sup> *Vide supra, § 32. hujus Capitis,*  
num. 2. *J. B.*

<sup>7</sup> *Vellet enim lex, omnes etiam mente esse quam purissimos]* Chrysostomus ad Rom. iii. 13. et ad caput vii. multa habet in hanc rem.

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since error about divine things, which are obscure to us, is easily committed, and the impulse of anger may be pardoned.

3 But in matrimony, where so many matches are to be had, to attempt to disturb the married life of another; or in property, when the division is so equal, to contrive devices by which one may enrich himself at the expense of another, was not to be borne. That command, *Thou shalt not covet*, in the Decalogue, although if you look at the object of the law, that is, the spiritual object, it is of wide extent; for the law desires all to be pure even in mind; yet as to the external precept, the carnal commandment, it refers to the affections of the mind which are disclosed by deeds; as appears by St Mark, who gives that same precept, *Defraud not*; having before given, *Do not steal* (Mark x. 19). And the Hebrew word and the Greek one corresponding are found in that sense in Micah ii. 2, *And they covet fields, &c.* And elsewhere.

4 Therefore inchoate delicts are not to be punished by arms, except either the matter be grave and have gone so far that, from such act, a certain evil, though not that which was intended, has ensued; or at

malum, etsi nondum illud quod intendebatur, secutum jam sit, aut certe ingens periculum, ita ut vindicatio aut conjuncta sit cum cautione futuræ noxæ, (de qua supra egimus in capite de defensione) aut dignitatem lœsam tueatur, aut perniciose exemplo occurrat.

XL. 1 Sciendum quoque est, reges, et qui par regibus jus obtinent, jus habere poenas pescendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quæ ipsos peculiariter non tangunt, sed in quibusvis personis jus naturæ aut gentium immaniter violant. Nam libertas humanæ societati per poenas consulendi, quæ initio, ut diximus, penes singulos fuerat, civitatibus ac judiciis institutis penes summas potestates resedit, non proprie qua aliis imperant, sed qua nemini parent. Nam subjectio aliis id jus abstulit. Imo tanto honestius est alienas injurias quam suas vindicare, quanto in suis magis metuendum est ne quis doloris sui sensu aut modum excedat, aut certe animum inficiat.

2 Et hoc nomine ab antiquis prædicatus est Hercules quod Antæo, Busiride, Diomede, et similibus <sup>De Benef. I.</sup> tyrannis liberarit terras, quas, ut Seneca de eo loquitur, transiit non <sup>13.</sup> cupiscendo, sed vindicando, maximorum bonorum auctor ho-  
<sup>Iloc. Hel.</sup>  
<sup>Ene. pp. 212,</sup> 213.

\* *Tyrannus liberarit terras]* Et ma-  
ria. Philo de Legatione: 'Ηρακλῆς  
ἐκάθηρε γῆν καὶ θάλατταν, ἀθλούς  
ἀναγκαιοτάτους καὶ ὀφελιμωτάτους  
ἄπασιν δυθράποις ὑποστάς, ἔνεκα τοῦ  
τὰ βλαβερὰ καὶ κακωτικὰ φύγεως ἐκα-  
τέρας διελεῖν. Hercules purgavit terras  
ac maria, certamina subiens hominibus

omnibus partim necessaria partim per-  
tilia, ut tolleret hominum animantism-  
que aliorum ea que exitialia aut noxia  
essent. (Pag. 1003 d.)

\* *Ultor ut scelerum vocer]* Ibidem  
dilecenti Faciali (vers. 574):

\* Ή πάσιν αὖ σ' ἔφυσεν ἡμέραιν πατήρ;  
Ten' ergo sevit omnibus genitor parem?

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least, great danger; so that the punishment be conjoined with protection against future mischief, or be a defense of offended dignity, or a remedy to a pernicious example.

XL. 1 It is to be understood also that kings, and they whose rights are of the nature of royal rights, have the right of requiring punishment, not only for injuries committed against them and their subjects, but for those also which do not peculiarly touch them, but which enormously violate the law of nature and nations in any persons. For the liberty of providing for human society by punishment, which at first, as we have said, was in the hands of individuals, did, when states and tribunals were instituted, fall to the share of the supreme authorities, not properly as commanding others, but as being themselves subject to none. For subjection took away the right

minibus, ut Lysias indicat, injustos puniendo. Diodorus Siculus de eo sic loquitur: *τοὺς παρανομοῦντας ἀνθρώπους ἡ δυνάστας ὑπερηφάνους ἀποκτείνας, τὰς πόλεις ἐποίησεν εὐδαίμονας homines injustos et reges insolentes tollendo beatas reddebat civitates.* Alibi dixit: *ἐπῆλθε τὴν οἰκουμένην κολαζώντων τοὺς ἀδίκους orbem obiit pœnas de iniquis expertens.* Dio Prusseensis de eodem: *τοὺς πονηροὺς ἀνθρώπους ἐκόλαζε, καὶ τῶν ὑπερηφάνων ἀνθρώπων κατέέλυε καὶ ἀφηρεῖτο τὴν ἔξουσίαν homines malos puniebat, et superborum regna destruebat, aut in alios transferebat.* Aristides in Panathenaico ait eum suscepta communi humani generis cura meruisse in Deos referri. Laudatur similiter Theseus quod latrones Scirona, Sinin, et Procusten sustulerit, quem sic de se loquenter *Supplicibus* inducit Euripides (vers. 340, 341):

Pridem facinora nomen hoc per Græciam  
Mihi dederunt, <sup>7</sup> ultor ut scelerum vocer.

Valerius Maximus de eodem: *quicquid ubique monstri aut sceleris fuit, virtute animi ac robore dextræ comminuit.*

3 Sic non dubitamus quin justa sint bella in eos qui in parentes impii sunt, quales Sogdiani antequam eos Alexander hanc feritatem dedoceret: in eos qui <sup>Plut. de Fort. Alex. p. 328 c.</sup> <sup>3. ext.</sup> <sup>Tom. II.</sup> <sup>187, 188 pp.</sup> <sup>3. ext.</sup> <sup>3. ext.</sup> <sup>3. ext.</sup> hospites occidunt: in

Respondet Theseus:

*Οσοι γ' ὑβρισταί χρηστὰ δὲ οὐ κολάζουμεν.  
Injuria. Nam bonos non tangimus.*

Plutarchus in ejus vita: *ἀπῆλλαττε τὴν Ἑλλάδα δεινῶν τυράννων pessimis tyrannis Græciam liberavit. Item: οὐδὲν αὐτὸς ἀδικούμενος ὥρμησεν ὑπὲρ ἀλλων ἐπὶ τοὺς πονηρούς nihil ipse*

*passus injurie, pro aliis in homines malos impetum sumebat, (pag. 37 c.)*

<sup>7</sup> Exemplum istud, quod in prima Editione legitur, in aliis omnibus exciderat. Neque enim ulla fuit ratio Auctori ejiciendi: et in animo habuerat, quod de veteribus Scythis refertur a STRABONE, Geogr. Lib. VII. p. 300. O-

from others. Indeed it is more honourable to punish the injuries of others than your own, in proportion as, in your own, it is to be feared lest a person may, by the sense of his own pain, either exceed due measure, or vitiate his mind with malice.

2 And on this account Hercules is praised by the ancients for having freed the land from Antæus, Busiris, Diomedes, and similar tyrants; having, as Seneca says, passed through the land not in concupiscence, but in just indignation, and thus being the author of great good to man. So Lysias, Diodorus, Dio Prusseensis, Aristides. Theseus is praised in like manner for removing the robbers Sciron, Sinis, and Procustes. See Euripides, Valerius Maximus.

3 Thus we do not doubt that war is just against those who are impious against their parents; such as the Sogdians were, before Alexander

eos "qui humanam carnem epulantur, \*a quo more absistere Gallos veteres Hercules coëgit, narrante <sup>8</sup>Diodoro; in eos qui

<sup>De Benef. vii. 19.</sup> piraticam exercent. Seneca: *si non patriam meum impugnat, sed suæ gravis est, et sepositus a mea gente suam exagitat, abscidit nihilominus illum tanta pravitas animi.*

<sup>Lib. v. De Cœ. c. 1.</sup> Augustinus: *opinantur scelera facienda decerni, qualia si aliqua terrena civitas decerneret, decrevissetve, genere humano decernente fuerat evertenda.* De talibus enim barbaris, et feris magis quam hominibus, dici recte potest quod de Persis, qui Græcis nihilo deteriores erant, perverse dixit Aristoteles, naturale in eos esse bellum; et quod Isocrates Panathenaico dixit, justissimum esse bellum in bellas, proximum in homines <sup>9</sup>belluis similes.

VIDIO, IV. *Trist. Eleg. iv. vers. 63, 64.*  
LACTANTIO, *Inst. Div. Lib. i. cap. 21.*  
*J. B.*

"*Qui humanam carnem epulantur]*  
Hoc quoque Scythas Alexander deducuit. [Vid. Plutarch. ibid.]

\**A quo more absistere Gallos veteres Hercules coëgit* Vide Dionysium Halicarnassensem narrantem ut Hercules hunc morem aliquæ multa abstulerit, in beneficiis suis Græcos a barbaris non distinguens. Romanorum non minora in genus humanum merita prædicat Plinius xxx. 1. *Non satis aestimari potest quantum Romanis debeatuer, qui sustulerent monstra, in quibus hominem occidere religiosissimum erat, mandi vero etiam saluberrimum.* Conjungeoque

hoc ipso capitè dicentur § 47. Sic Justinianus principibus Abasgorum edixit ne subditorum pueros castrarent. Procopius meminit *Gothicorum* IV. (seu *Hist. Misc.* cap. 3) et Zonaras *Leone Isauro.* Et Inchæ, in Peruana reges, [de quibus videndus Gardiass. de la Vega] vicinos populos, qui moniti non parerent, vi coegero absistere ab incestis, a marium cum maribus concubitu, a comedione hominum, aliisque id genus facinoribus, atque eo modo imperium sibi pararunt omnium que usquam legimus, excerpta religione, justissimum. [*DIONYSIUS HALICARNASSENSIS* narrat equidem, Herculem veteribus Italæ incolis persuasisse, ut, loco victimarum humanarum, effigies quasdam hominum

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cured them of this barbarity; against those who kill strangers; against those who feed on human flesh, which usage Hercules compelled the Gauls to give up, as Diodorus narrates: and against those who practise piracy. Seneca says, that though he does not do any harm to my country, yet such depravity cuts him off [from the tie of humanity]: Augustine says that there are things which if any state on earth have decreed, or should decree, that state would require to be overthrown by a decree of the human race. Of such barbarians, and wild beasts, rather than men, we may say what Aristides previously said of the Persians, (who were really no worse than the Greeks,) that war against them is natural; and what Isocrates said, that war against brute beasts was most just, and next to that, war against men who are like brutes.

4 And so far we follow the opinion of Innocentius, and of others

4 Et eatenus sententiam sequimur Innocentii, et aliorum qui bello aiunt peti posse eos <sup>qui</sup> qui in naturam delinquunt: contra quam sentiunt Victoria, Vasquius, Azorius, Molina, alii, qui ad justitiam belli requirere videntur, ut qui suscipit aut Iæsus sit in se aut republica sua, aut ut in eum qui bello impetratur jurisdictionem habeat. Ponunt enim illi puniendi potestatem esse effectum proprium jurisdictionis civilis, cum nos eam sentiamus venire etiam ex jure naturali, qua de re aliquid diximus libri primi initio. Et sane si illorum a quibus dissentimus admittatur sententia, jam hostis in hostem puniendi jus non habebit, etiam post juste <sup>1</sup> susceptum bellum ex causa non punitiva: quod tamen jus plerique concedunt et usus omnium gentium confirmat, non tantum postquam debellatum est, sed

Saturno offerrent: verum ibidem docet, morem illum inhumanum et ferinum manere adhuc sua estate apud Gallos, et alias Populos Occidentis. *Antiq. Rom.* Lib. i. cap. 38. Vide et *JULIUM CAESAREM, Comment. De Bell. Gall.* Lib. vi. cap. 16. *CICEROBENM, Orat. pro Fonteio*, cap. 10. *J. B.*

<sup>1</sup> Voluit dicere Auctor, Dionysio Halcianassensi. In quo tamen eum eximio Historico perperam testimonium denuntiare, patet ex iis, quæ Nota ipsius Auctoris subjecimus. *J. B.*

<sup>2</sup> Immo in Barbaros, quos pro *natura hostibus* habebant Græci. Inspice locum p. 267 b. *Ed. H. Steph.* *J. B.*

<sup>3</sup> Qui in naturam delinquunt] Vide Josephum Acostam de *Procuranda In-*

*dorum Salute* Lib. ii. cap. 4.

<sup>1</sup> Non potui a me impetrare, quin adderem heic vocem illam *juste*, quæ, quamquam in omnibus Edd. desit, omnino excidisse mihi videtur, non minus quam *rō injuste* vidimus supra, cap. 12. § 10. Postulat additamentum particula *etiam*: ex recepta enim hactenus lectione sequeretur, secundum dissidentes, bellum suscipi posse et *ex causa punitiva*, et *ex causa non punitiva*; quod falsum. Deinde major eset dubitandia ratio, an post bellum susceptum *ex causa non punitiva* hostis in hostem puniendi jus habeat, quam post bellum susceptum *ex causa punitiva*: cuius tamen contrarium supponit illud *etiam*, ut quivis videt. Debuisset tunc dici *sallēm*,

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who say that war may be made against those who sin against nature; contrary to the tenets of Victoria, Vasquius, Azorius, Molina, and others; who seem to require, in order to justify a war, that he who undertakes it should be either injured in his own person, or in the country to which he belongs, or that he should have jurisdiction over him whom he attacks. For they hold that the power of punishing is the proper effect of Civil Jurisdiction; while we conceive that it comes also from Natural Law. If the opinion of those from whom we dissent be admitted, an enemy will not have the power of punishing an enemy, even after war has been justly begun, if it be for another cause than to inflict punishment: which right, however, most authors concede, and the usage of all nations confirms, not only after the war has been finished, but even while it is going on; and this right is claimed, not from any civil juris-

Innoc. c.  
quod rup. his:  
de vot. Arch.  
Flor. 3. part.  
tit. 22. c. 5.  
§ 8. Sylv.  
In Verb. Pap.  
q. 7.  
Rel. 1. de  
Ind. n. 40.  
Contr. III. l.

et manente bello; non ex ulla jurisdictione civili, sed ex illo jure naturali quod et ante institutas civitates fuit, et nunc etiam viget, quibus in locis homines vivunt in familias non in civitates distributi.

XLI. Sed cautiones hic nonnullæ adhibendæ sunt; prima ne mores civiles, quamvis inter multos populos non sine ratione recepti, sumantur pro jure naturæ: qualia ferme erant illa quæ Persas a Græcis disparabant, ad quæ recte Plutarchi illud referas: *πρόφασιν πλεονεξίας ημερώσαται τὸ βαρβαρικόν· barbaras gentes ad mores cultiores reducere velle obtentum esse quo veletur alieni cupiditas.*

XLII. Secunda, ne temere annumeremus a natura vetitæ ea de quibus id non satis constat, et quæ lege potius divinæ voluntatis interdicta sunt, in qua classe forte ponere liceat *\*innuptos concubitus*, et quosdam eorum qui incesti dicuntur, et foenus.

XLIII. 1 Tertia, ut diligenter distinguamus inter prin-

non *etiam*. Adde, ut fecimus, *justæ*, omnia plana sunt: si enim bellum in*justæ* susceptum fuerit, tunc *injustitia* illa caussæ minus mirum efficit, quod jus puniendi desit. J. B.

*\* Innuptos concubitus]* Asterius Amaseæ episcopus: *οἱ τοῖς τοῦ βίου*

*τούτου νομοθέταις προσέχοντες ἀνεύθυνον καταλείπονται τῆς πονειας τὴν δέουσιαν qui hujus tantum saeculi leges condentibus obtemperant, impunitam relinquent meretrici licentiam.* Adde locum Hieronymi ad Oceanum, produc-tum a nobis ad caput v. § 9.

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diction, but from that natural right which existed before states existed, and is still in force in places in which men live, distributed into families and not into states.

XLI. But here some cautions are to be applied; first, we are not to take instituted usages of states, though received among many nations, and not without reason, for the laws of nature; of which kind mostly were those things in which the Persians differed from the Grecians; to which we may refer what Plutarch says: *that to profess to civilize barbarous nations, was a pretext to cover mere cupidity.*

XLII. In the second place, we must take care that we do not rashly reckon, among the things forbidden by nature, those, with regard to which this is not clear; and which are rather interdicted by the divine will: in which class we must place concubinage, and some of the offenses called incest, and usury.

XLIII. 1 In the third place, we must carefully distinguish between general principles,—such as that we must live virtuously, that is, according to reason, and some which approach to them and are so

cipia generalia, quale est honeste vivendum, id est, secundum rationem, et quædam his proxima, sed ita manifesta ut dubitationem non admittant, quale est alteri suum non rapiendum, et inter illationes quarum aliæ facilem habent cognitionem, ut posito matrimonio <sup>a</sup>non admittendum adulterium, aliæ vero difficultorem, ut ultiōrem quæ in dolore alterius acquiescit esse vitiosam. Ferme idem hic evenit quod in mathematicis, ubi quædam sunt notitiae primæ, aut primis proximæ, quædam demonstrationes quæ statim et intelliguntur et assensum obtinent, quædam veræ quidem sed non omnibus patentes.

2 Sicut ergo circa leges civiles eos excusamus qui legum notitiam aut intellectum non habuerunt, ita et <sup>b</sup>circa naturæ leges par est eos excusari quibus aut ratiocinationis imbecillitas aut prava educatio obstant. Nam ignorantia legis sicut, inevitabilis si sit, tollit peccatum; ita etiam cum aliqua negligentia conjuncta delictum minuit. Atque ideo Aristoteles barbaros, qui prave educati circa talia delinquent, iis com-

<sup>a</sup> Non admittendum adulterium] A-dulteria ubique puniri testatur Philo vita Josephi, (pag. 533 b.) adulterium natura turpe esse Ulpianus I. Probrum 42. D. de Verborum Significatione. Lactantius in Epitome: corrumpere alienum matrimonium etiam communi gentium jure damnatur. (Cap. 5.)

<sup>b</sup> Circa naturæ leges par est eos excusari quibus aut ratiocinationis imbecillitas aut prava educatio obstant] Hieronymus II. aduersus Jovinianum: unaquæque gens hoc legem nature putat quod didicit. (Tom. II, pag. 75. Edit. Basil.)

manifest that they admit of no doubt, as, for instance, that we are not to take by violence what belongs to another;—and inferences from these; of which some are easy to know, for instance, that assuming matrimony, we are not to allow adultery; but others not so easy, as that the revenge which has for its ultimate object the pain of others is vicious. We have here nearly the same case as in mathematics, where there are certain primary notions, or truths immediately connected with these, [axioms], and some demonstrations which are forthwith understood and obtain assent; and again, certain propositions which are true but not apparent to all.

2 As then, with regard to civil laws, we excuse those who did not know, or did not understand the law; so also with regard to the law of nature, it is reasonable to excuse those who are embarrassed, either by weakness of reason or by a bad education. For ignorance of the law, as, when it is invincible, it takes away the sin, so too, even when mixed with some negligence, it diminishes the offense. And therefore Aristotle compares barbarians who, being educated in a depraved manner, commit offenses in such cases, to those who have appetites

per quae mortes corrugatos habent apparetum. Plutarchus autem quodammodo iurisprudentia cui recte non videatur te certi quatuor existantur tunc argumentos: mortes enim qui hominem de naturali statu deponunt.

3 Postremo illud addendum, quod semel dico ne supra repetam, que ad pacem exigendam suscipiuntur bella suspecta esse injunctio, nisi socii sint atrocissima et manifestissima, aut alia simili aboma causa concurrat. De Romanis Mithridates forte non extra verum auctorat: non delicta regum illorum sed tironum ac maiestatem inseque.

*ad C. Petz. Part. 2. 1. 11.*

XLIV. 1 Perdixit nos ordo ad delicta que in Deum committantur: queritur enim an ad ea vindicanda bellum suscipi possit, quod late satis tractat Covarruvias. Sed ille alios secutus existimat punitivam potestatem non esse sine proprio dicta jurisdictione: quam sententiam nos jam ante rejecimus. Unde sequitur, sicut in rebus ecclesie dicuntur episcopi aliquo modo την καθολικην τελοτεροιν: id est, *'universalis ecclesiae curam accepisse, ita et regibus, preter pecuniariem sui civitatis, etiam generalem pro humana societate curam incumbere.* Potior ratio pro sententia negante justa esse bella talia, haec est, quod Deus sufficiente vindicandis

*'Universalis ecclesiae curam accepisse.'* Est id in constitutionibus preseruentibus nomine Clementis. (Lib. VI. cap. 14.) Cyprianus epist. XXX. Omnes enim nos docet pro corpore totius

ecclesie, cuius per varii quaque provincias membra digesta sunt, excudere. (Ep. 36. secundum divisionem Fell.) Et de unitate ecclesie: episcopatus unus est, cuius a singulis in solidum pars te-

corrupted by disease. Plutarch says: *There are certain diseases which throw the mind out of its usual balance.*

3 In the last place, that also is to be added, which I say once for all, that wars undertaken on the ground of punishment, must be very suspected, except the crimes are very atrocious and very manifest; or except some other cause concur. Perhaps Mithridates was not very wrong when he said of the Romans, that *they did not really attack the tives of kings, but their power and majesty.*

XLIV. 1 Our order has led us to the offenses which are committed against God. For it is made a question whether war may be undertaken to punish these; and this is treated at sufficient length by Covarruvias. But he, following others, thinks that there is no punitive power without jurisdiction properly so called; which opinion we have already rejected. Whence it follows, that as bishops are said, in a certain way, to have received the care of the catholic or universal Church, so kings, besides the care of their particular state, have in-

quæ in se committuntur, unde dici solet, *Deorum injurias* <sup>L. 2. C. de  
reb. cred.</sup> *diis curæ, et perjurium satis Deum habere ultorem.*

2 Verum sciendum est idem et de aliis delictis dici posse. Nam illis quoque puniendis Deus haud dubie sufficit, et tamen ea ab hominibus recte puniuntur, nemine dissentiente. Instabunt quidam et dicent, alia delicta ab hominibus puniri, quatenus homines alii inde læduntur aut periclitantur. Sed notandum contra, non tantum ab hominibus puniri delicta quæ directe alios lædant, sed et quæ per consequentiam, qualis sui occisio, concubitus cum bestiis, et alia quædam.

3 Religio autem quanquam per se ad conciliandam Dei gratiam valet, habet tamen et suos in societate humana effectus maximos. Neque enim immerito Plato religionem propugnaculum potestatis ac legum et honestæ disciplinæ vinculum vocat. Plutarchus similiter συνεκτικὸν ἀπάσης κοινωνίας καὶ νομοθεσίας ἔρεισμα, coagulum omnis societatis et fundamentum legislationis. Philoni quoque est φίλτρον <sup>Cont. Colot. p. 1125 n.</sup> *De Monarch.* ἀνυστιμώτατον καὶ δεσμὸς ἄλυτος εὐνοίας ἐρωτικῆς ἢ τοῦ ἐνὸς Θεοῦ τιμῆς efficacissimum amatorium, et vinculum indissolubile benevolæ amicitiae, <sup>p. 818 n.</sup> *unius Dei cultus.* Contraria omnia ab impietate :

*netur. (Pag. 108. Ed. Fell. Brem.) Exempla hujus curæ universalis passim apud Cyprianum: illustre imprimis epistola LXVII. (LXVIII. divis. Fell.) Additum Chrysostomum in laudibus S. Eustathii.*

<sup>d</sup> *Unitus Dei cultus]* Idem *de Fortitudine: αἰτιον τῆς ὁμονοίας τὸ δυνάτατον καὶ μέγιστον ἡ περὶ τοῦ ἐνὸς Θεοῦ δόξα, ἀφ' ἣ οὐαὶ πηγῆς ἐνωτικῆς καὶ ἀδιαλύτης φιλίᾳ κέχρηνται πρὸς ἀλλή-*

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cumbent upon them a general care for human society. The sounder reason for the doctrine that such wars are not just, is this, that God is sufficient to punish offenses against himself; whence it is commonly said, that *wrongs against the gods are the business of the gods*, and that, *perjury has a sufficient avenger in God.*

2 But it is to be recollected that this may be said of other offenses also. For God is no doubt sufficient to punish these also; and yet they are rightly punished by men, no one dissenting. Some pursue the argument, and say, that other offenses are punished by men, so far as men are by them hurt or injured. But it is to be noted, on the other hand, that offenses are punished which not only hurt others directly, but those also which do so by consequence, as self-murder, and bestiality, and others.

3 For though religion of itself is efficacious in conciliating the favour of God, yet it has in human society its especial effects, and those very important ones. For Plato, with great reason, called

parat qui morbo corruptos habent appetitus. Plutarchus ait esse quædam νοσήματα καὶ πάθη τῆς ψυχῆς τὰ κατὰ φύσιν ἔξιστάντα τὸν ἀνθρωπον· morbos animi qui hominem de naturali statu dejiciant.

3 Postremo illud addendum, quod semel dico ne sepe repetam, quæ ad pœnam exigendam suscipiuntur bella suspecta esse injustitiae, nisi scelerata sint atrocissima et manifestissima, aut alia simul aliqua causa concurrat. De Romanis Mithridates forte non extra verum aiebat: *non delicta regum illos sed vires ac majestatem inseque*.

*Just. xxxviii.  
c.*

*Ad C. Pecc.  
Part. 2. § 10.*

XLIV. 1 Perduxit nos ordo ad delicta quæ in Deum committuntur: queritur enim an ad ea vindicanda bellum suscipi possit, quod late satis tractat Covarruvias. Sed ille alios secutus existimat punitivam potestatem non esse sine proprie dicta jurisdictione: quam sententiam nos jam ante rejecimus. Unde sequitur, sicut in rebus ecclesiæ dicuntur episcopi aliquo modo τὴν καθολικὴν πεπιστεῦσθαι. id est, <sup>c</sup>universalis ecclesiæ curam accepisse, ita et regibus, præter peculiarem suæ civitatis, etiam generalem pro humana societate curam incumbere. Potior ratio pro sententia negante justa esse bella talia, hæc est, quod Deus sufficiat vindicandis

<sup>c</sup>Universalis ecclesiæ curam accepisse] Est id in constitutionibus præferentibus nomen Clementis. (Lib. vi. cap. 14.) Cyprianus epist. xxx. Omnes enim nos decet pro corpore totius ecclesiæ, cuius per varias quasque provincias membra digesta sunt, excubare. (Ep. 38. secundum divisionem Fell.) Et de unitate ecclesiæ: episcopatus unus est, cuius a singulis in solidum pars te-

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corrupted by disease. Plutarch says: *There are certain diseases which throw the mind out of its usual balance.*

3 In the last place, that also is to be added, which I say once for all, that wars undertaken on the ground of punishment, must be very suspected, except the crimes are very atrocious and very manifest; or except some other cause concur. Perhaps Mithridates was not very wrong when he said of the Romans, that *they did not really attack the vices of kings, but their power and majesty*.

XLIV. 1 Our order has led us to the offenses which are committed against God. For it is made a question whether war may be undertaken to punish these; and this is treated at sufficient length by Covarruvias. But he, following others, thinks that there is no punitive power without jurisdiction properly so called; which opinion we have already rejected. Whence it follows, that as bishops are said, in a certain way, to have received the care of the catholic or universal Church, so kings, besides the care of their particular state, have in-

quæ in se committuntur, unde dici solet, *Deorum injurias* <sup>L. 2. C. de  
diis curæ, et perjurium satis Deum habere ultorem.</sup>

2 Verum sciendum est idem et de aliis delictis dici posse. Nam illis quoque puniendis Deus haud dubie sufficit, et tamen ea ab hominibus recte puniuntur, nemine dissentiente. Instabunt quidam et dicent, alia delicta ab hominibus puniri, quatenus homines alii inde lœduntur aut periclitantur. Sed notandum contra, non tantum ab hominibus puniri delicta quæ directe alios lœdant, sed et quæ per consequentiam, qualis sui occisio, concubitus cum bestiis, et alia quædam.

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p. 1125 n.</sup> <sup>De Monarch.  
p. 818 n.</sup> ἀννομάτατον καὶ δεσμὸς ἀλυτός εὐνοίας ἐρωτικῆς ἢ τοῦ ἐνώς Θεοῦ τιμῆς efficacissimum amatorium, et vinculum indissoluble benevolæ amicitiæ, <sup>d</sup>unius Dei cultus. Contraria omnia ab impietate :

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3 For though religion of itself is efficacious in conciliating the favour of God, yet it has in human society its especial effects, and those very important ones. For Plato, with great reason, called

Sil. Ital. iv.  
794.

Heu primæ scelorum causæ mortalibus ægris,  
• Naturam nescire Dei.

De Superst.  
p. 164 n.

Omnis falsa, inquit Plutarchus, de rebus divinis persuasio perniciosa, accedente animi perturbatione perniciosissima. Ex Protrep. c. 3 stat apud Jamblichum sententia Pythagorica: ή γνῶσις τῶν θεῶν ἀρετή τε ἐστὶ καὶ σοφία καὶ εὐδαιμονία τελεία. *Dei cognitio et virtus est, et sapientia, et perfecta felicitas.*

L. 2. D. de  
Legg.

vii. Polit. c. 8.

L. 10. § 2. D.

De Just. et

Jur.

De Creat.

Magist. p.

723 n.

*ris, et una excellentissima virtus justitia tollitur.* Idem alibi: *justitiam adfert, cum cognitum habeas quod sit summi rectoris et domini numen, quod consilium, quæ voluntas.* Atque hujus rei evidens argumentum est, quod Epicurus, cum divinam providentiam sustulisset, <sup>De Fin. iv. 5.</sup> *justitiæ quoque nihil reliquit nisi nomen inane, ut quam nasci diceret ex sola conventione, neque durare ulterius quam communis duraret utilitas, abstinentum autem ab his quæ alteri nocitura essent solo pœnæ metu.* Verba ipsius ad hanc rem sane insignia exstant apud Diogenem Laërtium.

5 Vedit hunc nexus et Aristoteles, qui v. *de Repub.* cap. xi. sic ait de rege: *ἡττον φοβούνται τὸ παθεῖν τι παράνομον ὑπὸ τῶν τοιούτων, ἐὰν δεισιδαίμονα νομίζωσιν εἶναι τὸν ἄρχοντα· minus enim populus timebit injuste tractari a principe quem religiosum credat.* Et Galenus libro ix. de placitis Hippocratis et Platonis, cum multa de mundo divinaque natura quæri dixisset, nullo ad mores usu, quæstionem de providentia agnoscit usus esse maximi tum ad privatas

καὶ λαβεῖν ήδυνηθῆσαν, ἀκριβῆ γνῶσιν διορίσαντας, πρὸς τοῦτο ποιήσασθαι τὴν ἀλληλή τάξιν τοῦ πολιτεύματος. Vide et quæ sequuntur ibidem optime,

(pag. 491. § 35.)

<sup>1</sup> *Inter curas publicas prima de rebus divinis]* Ad quarum cognitionem Imperatores vocans Justinus Martyr addit: βασιλικὸν ἀν καὶ τοῦτο ἔργον

εἰη· erit hoc opus sane regium. (*Apolog.* II. cap. viii. pag. 23. *Edit. Oeon.* 1708.) Adde quæ habet Covarruvias in c. pec-  
catum, Part. II. § 10.

<sup>2</sup> *Justitiae quoque nihil reliquit nisi nomen inane]* Seneca epist. xcviij. Illic dissentiamus cum Epicuro, ubi dicit nihil justum esse natura, et crimina vitanda esse, quia vitari metus non possit.

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attached to him in proportion as they feared God more; but also, in the common society of the human race. *If we take away piety, says Cicero, good faith and the fellow-feeling of mankind and justice are taken away.* And again: *We learn what justice is when we know the authority of the supreme Governor and Lord, what is his design, what his will.* And an evident proof of this is, that Epicurus, when he had taken away divine providence, left nothing but the empty name of justice, saying that it arose from convention only, and lasts so long only as the common utility continues; that we must abstain from every thing which would turn others, solely from the fear of punishment. See his words in Diogenes Laertius.

5 Aristotle also saw this connexion, as where he says of a king, that *the people will the less fear to be unjustly treated by the prince, if they believe him to be religious.* And Galen says that many discussions are carried on, about the world and the divine nature, without any moral use; but he acknowledges the question concerning providence to be of

tum ad publicas virtutes. Vedit et hoc Homerus, qui *Odyssææ* sexto et octavo hominibus *ὑθρισταῖς καὶ ἀργοῖς, feris et injustis,* opponit eos quibus *νόος ἔστι θεοῦδης, mens religiosa.* Sic *Judeorum veterum h̄justitiam religione permixtam*

*Ver. 120, et  
Irigg.  
Ver. 576.*

*Lih. xxxvi. 2.  
Geograph.  
xvi. p. 761.*

*Inst. Div.  
v. 14.*

*De Ira Del.  
c. 7.*

*L. & C. de  
Hæreticis.*

*sicut eosdem Judæos Strabo δικαιοπραγοῦντας καὶ εὐσεβεῖς ὡς ἀληθῶς ὄντας.* Lactantius: *si ergo pietas est cognoscere Deum, cuius cognitionis haec summa est ut eum colas, ignorat utique justitiam, qui religionem Dei non tenet.* Quomodo enim potest eam nosse qui unde oriatur ignorat? Idem alibi: *religioni est propria justitia.*

6 Jam vero majorem etiam usum habet religio in majori illa quam in civili societate, quia in civili partem ejus supplent leges et facilis legum exsecutio: cum contra in magna illa communitate juris exsecutio sit difficillima, ut quæ nisi armis expleri nequeat, et leges paucissimæ: quæ ipse insuper sanc-timoniam suam habent præcipue a metu numinis; unde qui in jus gentium peccant, divinum jus violare passim dicuntur. Non male ergo religionem contaminatam ad omnium pertinere injuriam dixerat Imperatores.

XLV. 1 Ut rem totam penitus introspiciamus, notandum est, religionem veram, quæ omnium ætatum communis

*h Justitiam religione permixtam]*  
Philo *Vita Abrahæmi:* τῆς αὐτῆς φύσεως ἐστιν εὐσεβῆ τε εἶναι καὶ φιλάνθρωπον, καὶ περὶ τὸν αὐτὸν ἑκάτερον δυσότητι μὲν πρὸς θεὸν, δικαιοσύνῃ δὲ πρὸς ἀνθρώπον θεωρεῖται: ejusdem est naturæ religiosum esse et hominum amantem: apud eundem spectantur pietas in

*Deum, et in homines justitia,* (pag. 378 d.)

*Antisthenes]* Laudatus Clementi Alexandrino. [Cap. vi. pag. 66. Ed. Oxon. ubi tria priora verba desunt.] Ex illo videtur hoc promisse Seneca Lib. vii. c. 30. naturalium questionum: ipse qui ea tractat, qui condidit, qui totum

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the greatest use, both in its bearing upon private and upon public virtues. So Homer opposes, to wild and unjust men, those who have a religious mind. So Justin praises, in the ancient Jews, their justice mixed with religion: and so Strabo. So Lactantius says that he who is not religious does not know what justice is.

6 And religion is even more useful in that larger society [of the human race] than in civil society; since in the latter, its place is supplied by laws, and the easy execution of laws; while on the contrary, in that wider community, the execution of law is very difficult, since it can only be carried into effect by arms, and the laws are very few. And these too have their sanction mainly from the fear of the divine power: and hence, they who transgress the Laws of Nations, are every-

est, quatuor præcipue pronuntiatis niti; quorum primum est, Deum esse, et esse unum: secundum, Deum nihil esse eorum quæ videntur, sed his aliquid sublimius: tertium, a Deo curari res humanas, et æquissimis arbitriis dijudicari: quartum, eundem Deum opificem esse rerum omnium extra se. Hæc quatuor totidem decalogi præceptis explicantur.

2 Nam primo aperte traditur Dei unitas: secundo natura ejus inconspicua: nam propter eam imago ejus extrui vetatur Deut. iv. 12. Quomodo et <sup>1</sup>Antisthenes dicebat: ὁφθαλμοῖς οὐχ ὄραται, οὐδενὶ ἔοικεν, διόπερ αὐτὸν οὐδεὶς ἐκμαθεῖν ἐξ εἰκόνος δύναται. oculis non conspicitur, rei nulli est similis, unde nec quisquam eum potest ex effigie cognoscere. <sup>2</sup>Philo autem; τὸν ἀόρατον εἰκονογράφειν η̄ διαπλάσσειν οὐχ ὄσιον profanum est ejus qui inconspicuus est pingendo aut fingendo imaginem exhibere. Diodorus Siculus de Mose: <sup>Escript. Lib. XI.</sup> ἄγαλμα οὐ κατεσκένασε διὰ τὸ μη νομίζειν ἀνθρωπόμορφον εἶναι τὸν Θεόν. <sup>3</sup>simulacrum non constituit, eo quod Deum non crederet humana forma esse. Tacitus: *Judæi* <sup>num. v. 2.</sup> mente sola unumque numen intelligunt: profanos qui Deum imagines mortalibus materiis in speciem hominum effingunt. Plutarchus vero cur <sup>4</sup>Numa de templis simulachra sustulerit causam hanc reddit: ως οὐκ ἐφάπτεσθαι Θεοῦ <sup>p. 65 n. viii.</sup> <sub>Num.</sub>

*hoc fundavit, deditque circa se, majorque est pars operis sui ac melior, effugit oculos, cogitatione visendum est.*

<sup>1</sup> Philo autem] Dicit hæc apud Philonem rex Agrippa, (pag. 1032.)

<sup>1</sup> *Simulacrum non constituit*] Dion libro xxxvi. (pag. 41 E. Ed. H. Steph.) οὐδ' ἄγαλμα οὐδὲν ἐν αὐτοῖς ποτὲ τοῖς

'Ιεροσολύμοις ἔσχον ἀρρότον δὲ καὶ ἀειδὴν αὐτὸν νομίζοντες εἶναι, &c.: nec ullum Hierosolymis simulacrum habebant, quod Deum crederent neque conspici, neque verbis explicari posse. Vide et Strabonem libro xvi. (pag. 761.)

<sup>4</sup> *Numa*] De hoc Numæ instituto vide et Dionysium Halicarnassensem.

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where said to violate the divine laws. And hence the Emperors have rightly said that the infraction of religion is a wrong against all.

XLV. 1 To examine the whole matter, we must remark that true religion, common to all ages, rests mainly on four principles; of which the first is, that God exists, and is one: the second, that God is not any visible object, but something higher: the third, that God cares for human affairs, and judges them with perfect justice: the fourth, that God is the creator of all other things. These four points are delivered in the first four commandments of the Decalogue.

2 For in the first, the unity of God is plainly delivered: in the second, his nature, as invisible; for on this account it is forbidden to make any image of him. So Antisthenes; Philo; Diodorus, speaking

*δυνατὸν ἀλλως οὐ νοήσει· quod Deus concipi nisi sola mente non possit.* Tertio præcepto intelligitur cognitio et cura rerum humanarum, etiam cogitationum: nam id jurisrandi fundamentum est. Deus enim testis etiam cordis, et si quis fallat vindicta invocatur; quo ipso simul et justitia Dei significatur et potentia. Quarto, origo mundi totius auctore Deo, <sup>in</sup> cuius rei memoriam institutum fuit olim sabbatum, et quidem singulari quadam sanctimonia supra ritus alios. Nam si quis in alios ritus peccasset, poena legis erat arbitraria, ut de cibis vetitis; si in hunc, pœna capitis: quia sabbati violatio ex instituto continebat abnegationem mundi a Deo creati. Mundus autem a Deo creatus et bonitatem ejus et sapientiam et æternitatem et potentiam tacite indicat.

3 Ex his autem notionibus contemplativis sequuntur ac-

[Nihil habet hac de re eximus ille Antiquitatum Romanarum Scriptor. Debet Auctor noster CYRILLO, contra Julian. Lib. vi. p. 193. Edit. Spanhem. sed qui videtur ex errore Dionysium Halicarnassensem pro alio laudasse: nam putat Numam e Philosophia Pythagorica hoc institutum hausisse; quem Dionysius Halicarnassensis, Lib. ii. cap. 59. ostendat, Pythagoram quatuor etatibus post Numam vixisse, adeoque hunc illius discipulum esse non potuisse. J. B.]

<sup>o</sup> In cuius rei memoriam institutum fuit olim sabbatum] Scriptor responsorum ad orthodoxos, ad questionem LXXIX.

ἴτα σὺν φυλαχθῆ ἡ μνήμη τῆς τοῦ κόσμου ποιήσεις ἐν τοῖς ἀνθρώποις, διὰ τοῦτο τιμιάτερον τῶν ἀλλων εὐρίσκειν ἔταξε τὸν ἑπτά εἰρημάτων ἐν τῷ θείᾳ γραφῇ· ut ergo memoria mundi conditi inter homines seruaretur, ideo voluit Deus septenarium numerum in sacris literis eminere ceteris honoratiōem. Vide et qua procedunt. (Inter Opera Justini Martyr. pag. 336. Ed. Sylburg.)

<sup>o</sup> Quia consensio] Tertullianus adversus Marcionem: anima a primordio conscientia Dei dōs est. (Lib. i. c. 10.) φυσικὴ εὐλάβεια, pietas naturalis, Diodoro Siculo in fragmentis, (e Lib. xxxiiii.

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concerning Moses; Tacitus, of the Jews; Plutarch, of Numa.

By the third commandment is indicated God's knowledge and care of human things, even of human thoughts; for that is the foundation of oaths. For God is a witness even of the heart; and if any one swear falsely, He is invoked as the punisher: and by this is declared both the justice and the power of God.

By the fourth, the origin of the whole world in the act of God, in memory of which the sabbath was instituted, and hallowed with a peculiar sanction above other rites. For if any one transgressed other rites, the penalty of the law was arbitrary, as concerning forbidden meats: but for the violation of the sabbath, it was death; because the violation of the sabbath implied the denial of the creation of the world by God. And the world, as created by God, contains a tacit indication of his goodness, wisdom, eternity, and power.

3 From these contemplative notions follow active precepts; as that

tivæ, ut Deum honorandum, amandum, colendum, eique obtemperandum. Itaque Aristoteles eum qui Deum honorandum aut parentes amandos neget, non argumentis sed poena edomandum dixit. Et alibi alia quædam esse honesta, Deum <sup>Top. i. 11.</sup> <sup>Ibid. ii. 11.</sup> honore prosequi ubique. Istarum autem quas contemplativas diximus notionum veritas haud dubie etiam petitis ex rerum natura argumentis demonstrari potest, inter quæ illud validissimum est, quod res alias esse factas ostendat sensus, res autem factæ omnino nos ad aliquid non factum deducant. Sed quia hanc rationem et similes alias non omnes capiunt, sufficit quod ab omni ævo per omnes terras, paucissimis exceptis, in has notiones consenserunt, et hi qui crassiores erant quam ut vellent fallere, et alii sapientiores quam ut fallerentur: <sup>o</sup>quæ consensio in tanta et legum et opinionum aliarum varietate

Eeclog. ii.) Philo de Unius Imperio: οὐδὲν τεχνικῶν ἔργων αὐτοματίζεται. τεχνικώτατος δὲ ὁ κόσμος, ὡς ὑπό την ἐπιστήμην ἀγαθοῦ καὶ τελεοτάτου πάντων δεδημιουργῆσθαι τοῦτον τὸν τρόπον ἔννοιαν ἐλέφουεν ὑπάρξεως Θεοῦ· nihil artem præferens casu ortitur. Maximam autem artem mundus præfert, testaturque a summa périlo summeque perfecto se fabricatum. Notitia, qua Deum esse credimus, hinc ortum habet. (Pag. 815 E.) Tertullianus adversus Marcionem i. (cap. 18.) Nos defendimus Deum primum natura cognoscendum, deinde doctrina recognoscendum: natura ex operibus: doctrina ex prædi-

cationibus. Cyprianus de Idolorum Vanitate, (cap. v. num. 9. Ed. Cellar.) hæc est summa delicti, nelle agnoscere quem ignorare non possis. Julianus ad Heraclium: πάντες ἀδιδάκτως εἰναι θεῖον τι πεπείσμεθα, καὶ πρὸς τοῦτον ἀφορᾶν ἐπ' αὐτό τε οἷμαι σπεύδειν· οὕτω διατιθέμενοι τὰς ψυχὰς πρὸς αὐτὸν, ὥσπερ εἰναι πρὸς τὸ φῶτα τὰ βλέποντα omnes ante doctrinam numen aliquod esse persuasi sumus, eo respicendum, ad eum properandum: credoque sic animos nostros se habere ad Deum, ut visi prædicta ad Lucem. (Orat. vii. p. 200 c. Ed. Spanhem.)

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God is to be honoured, loved, worshipped, and obeyed. Hence Aristotle says that he who denies that God is to be honoured, or parents to be loved, is to be brought to reason, not by arguments, but by punishment. And elsewhere he says that other things are reckoned right in one place or another, but to honour God, in all places.

The truth of those contemplative notions, as we have called them, may doubtless be demonstrated by arguments taken from the nature of things; among which arguments, that is the strongest; that our senses shew us that some things are made; and that the things which are made lead us to something not made. But because all cannot take in this reason and similar ones, it is sufficient that all ages, and all countries, with very few exceptions, have given their consent to these notions: and those, some too dull to intend to deceive, and others too wise to be deceived. And this consent, in so

satis ostendit traditionem a primis hominibus ad nos propagatam, ac nunquam solide refutatam, quod vel solum ad fidem faciendam satis est.

4 Conjunxit ea quæ memorata nobis jam sunt de Deo  
*Orat. xii. p. 208.*  
 Dion Prusæensis, cum dixit ὑπόληψιν, id est, persuasionem de Deo, aliam esse nobis cognatam, ex argumentis scilicet petitam, aliam ἐπίκτητον acquisitam ex traditione. Plutarchus eandem vocat παλαιὰν πίστιν, ἡς οὐκ ἔστιν οὐδὲ ἀνευρεῖν τεκμήριον ἐναργέστερον, ἔδραν καὶ βάσιν ὑφεστῶσαν κοινὴν πρὸς εὐσέβειαν antiquam persuasionem, qua nullum haberi possit aut dici argumentum certius, fundamentum in commune pietati positum. Aristotle:  
*In Amator. p. 756 B.*  
*De Cœlo. I. 3. p. 287 D. n. Tom. II.*

XLVI. 1 Quare non vacant culpa qui, etiamsi hebetioris sint ingenii quam ut certa ad illas notiones argumenta aut reperire possint, aut comprehendere, eas repudiant, cum et ad honestum sint duces, et diversa sententia nullis argumentis nitatur. Sed quia de pœnis et quidem humanis agimus, discrimin hic adhibendum est inter notiones ipsas, et inter modum ab iis discedendi. Hæ notiones, numen aliquod esse (unum an plura sepono) et curari ab eo res hominum, maxime sunt universales, et ad religionem, sive veram, sive falsam, constituendam omnino necessariæ: τὸν προσερχόμενον τῷ Θεῷ, (id est, qui religionem habeat: nam religio Hebraeis accessus ad Deum vocatur) πιστεῦσαι δεῖ ὅτι ἔστι, καὶ τοῖς ἐκζητοῦσιν αὐτὸν μισθαποδότης γίνεται· eum credere oportet et esse Deum, et ab eo præmia dari se colentibus.

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great a variety of other laws and other opinions, shews sufficiently a tradition propagated from the first race of men to us, and never solidly refuted; which of itself is sufficient to produce belief.

4 The points which we here mention concerning God are brought together by Dio Prusæensis, when he says that our conception of God is partly internal, partly acquired by tradition. So Plutarch speaks of the ancient faith, than which no more evident proof can be found, the common foundation and basis of piety. So Aristotle and Plato.

XLVI. 1 Wherefore they are not blameless who, although they are too dull either to discover or to understand the solid arguments for these points of belief, reject them; since there exist, for them, guides to the right way, and the opposite opinion has no

2 Similiter Cicero: *Sunt philosophi, et fuerunt, qui nullam habere censerent humanarum rerum procurationem Deos, quorum si vera sententia est, quæ potest esse pietas, quæ sanctitas, quæ religio?* *hæc enim omnia pure ac caste tribuenda Deorum ita numini sunt, si animadvertiscuntur ab his, et si est aliquid a Diis immortalibus humano generi tributum.* Epictetus: *τῆς περὶ τὸν θεού εὐσέβειας* Enchir. c. 22. *ἰσθι ὅτι τὸ κυριώτατον ἐκεῖνό ἐστιν, ὥρθας ὑπολήψεις περὶ αὐτῶν ἔχειν, ὡς ὄντων καὶ διοικούντων τὰ ὅλα καλῶς καὶ δικαίως.* Pietatis hoc præcipuum, bene sentire de Diis, ut qui et sint et res omnes justæ ac recte administrent. Elianus ait, barbarorum neminem delapsum ad ἀθεό- Lib. II. 31. τητα, sed ab omnibus affirmari Pet esse numen, et nostri curam gerere. Plutarchus, libro de communibus notitiis, ait eam quæ de Deo est notitiam tolli, sublata providentia: *οὐ π. 1075 n.* γάρ ἀθάνατον καὶ μακάριον μόνον, ἀλλὰ καὶ φιλάνθρωπον καὶ κηδεμονικὸν καὶ ὠφέλιμον, προλαμβάνεσθαι καὶ τοεῖσθαι τὸν θεόν· *non enim immortalem tantum et beatum, sed et hominum amantem, ita ut et curet eos et prosit ipsis, concipi atque intelligi Deum.* Lactantius: *neque honor* De Ira Dei, c. 6. *ullus deberi potest Deo si nihil prestat colenti, nec ullus metus si non irascitur non colenti.* Et revera negare Deum esse, aut negare a Deo curari actiones humanas, si moralem effectum respicimus, tantundem valet.

3 Quare ipsa quasi necessitate auctore hæ duæ notiones

<sup>P</sup> *Et esse numen, et nostri curam gerere]* Seneca epistola xciv. *Primus est reddere illis majestatem suam, reddere bonitatem, sine qua nulla majestas est.* deorum cultus, deos credere: deinde,

arguments to rest upon. But since we are speaking of punishments, and of human punishments, a difference is to be taken between the notions themselves, and the mode of departing from them. These notions, that there is a deity (I do not here say whether one or many), and that he cares for human affairs, are most universal, and absolutely necessary to constitute all religion, true or false. *He that cometh to God (that is he who is to be religious) must believe that he is, and that he is a rewarder of them that seek him.* Heb. xi. 6.

2 So Cicero; Epictetus; Elian; Plutarch; Lactantius. To deny that God exists, and to deny that he attends to human affairs, comes to the same thing, as to its moral effect.

3 Wherefore these two points of belief have been preserved, as if by necessity, among almost all nations of which we know any-

<sup>L. 2. D. de  
Just. & Iure.  
Memorab. iv.  
4. num. 19.</sup>

<sup>apud omnes ferme quos novimus populos, per tot jam saecula,  
conservatae sunt. Hinc Pomponius erga Deum religionem  
juri asscribit gentium: et apud Xenophontem, Socrates τοὺς  
θεοὺς σέβειν, Deos colere legem esse ait, quae apud omnes</sup>

<sup>homines valeat: quod et Cicero tum de Natura Deorum libro  
primo, tum secundo de inventione affirmat. Dion Prusseensis  
oratione XII. vocat δόξαν καὶ ἐπίνοιαν κοινὴν τοῦ ξύμπαντος  
ἀνθρωπίνου γένους, ὁμοίως μὲν Ἑλλήνων, ὁμοίως δὲ  
βαρβάρων, ἀναγκαῖαν καὶ ἔμφυτον ἐν παντὶ τῷ λογικῷ  
γνωμένην κατὰ φύσιν persuasionem quae insit hominibus  
communiter omnibus, non minus barbaris quam Græcis,  
necessariam ac naturalem cunctis ratione utentibus. Et  
paulo post: πάννι ισχυρὰν καὶ αένναντον ἐκ τοῦ παντὸς χρόνου  
καὶ παρὰ πάσι τοῖς ἔθνεσιν ἀρξαμένην τε καὶ διαιμένουσαν  
persuasionem valde robustam ac sempiternam apud  
omnes gentes et cæptam et permanentem. Xenophon in  
Cap. IV. § 47. Convivio et Græcos et barbaros ita ait existimare, nota esse  
Diis et præsentia et futura.</sup>

4 Has igitur notitias qui primi incipiunt tollere, sicut in  
bene constitutis civitatibus coerceri solent, ut Diagoras Melio  
accidisse legimus, et Epicureis, qui ex bene moratis urbibus  
ejecti sunt, ita et coerceri posse arbitror nomine humanæ

<sup>Apud omnes ferme quos novimus  
populos]</sup> Seneca epist. CXVII. Tanquam Deos esse inter alia sic colligimus,  
quod omnibus de Ditis opinio insita est:  
nec illa gens usquam est adeo extra leges  
moresque projecta, ut non aliquos deos  
credat. Idem de Beneficiis IV. 4. nec  
in hunc furorem omnes mortales conser-  
sissent alloquendi surda numina et ineffi-  
caces Deos, &c. Adde Platonem Pro-  
tagora, (pag. 322. Tom. I.) et decimo  
de Legibus, (pag. 887 d. e. Tom. II.)

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thing. Hence Pomponius describes religion towards God as a part of the law of nations; and Socrates in Xenophon says that to worship the gods, is a rule among all men. So Cicero; Dio Prusseensis; Xenophon in the *Symposium*.

4 Therefore those who first begin to take away these convictions, as they may, in well constituted states, be coerced by punishment, as was done to Diagoras Melius, and to the Epicureans, who were ejected from well-governed states; so may they be coerced, as I conceive, in the name of human society, which they violate without probable reason. So Himerius pleading against Epicurus: *Do you then demand that mere doctrines be punished? By no means, but that impiety should. Men may deliver doctrines; they may not oppose piety.*

XLVII. 1 Other points of religion are not so evident; as, that there are not more gods than one: that God is not any visible

societatis, quam sine ratione probabili violant. Himerius Sophista actione in Epicurum: δόγματος οὐν ἀπαιτεῖς δίκας; Apud Phot.  
οὐκ, ἀλλ' ἀσεβείας· δογματίζειν μὲν γὰρ ἔχον, ἀσεβεῖν Cod. 243. col.  
δὲ οὐκ ἐπιτέτραπται· placiti igitur pænam exigis? neutrīam,  
ne*tiquam*, sed *impietatis*; placita tradere permittitur, non  
et pietatem oppugnare.

XLVII. 1 Ceteræ notiones non æque sunt evidentes, ut Deos plures uno non esse: nihil eorum quæ videmus Deum esse, non mundum, non cœlum, non solem, non aërem: mundum non esse ab omni aeternitate, ac ne ejus quidem materiam, sed a Deo facta. Itaque harum cognitionem temporum lapsu apud multos populos oblitteratam, et quasi extinctam videmus; eoque facilius quia leges hanc partem minus curabant, ut sine qua aliqua saltem consistere religio posset.

2 Ipsa lex Dei illi populo data quem Prophetæ et prodigia partim conspecta, partim non dubitandæ auctoritatis fama ad ipsos perlata, cognitione harum rerum nec obscura nec incerta imbuerant, quanquam falsorum Deorum cultus maxime detestatur, non tamen omnes ejus culpæ convictos morte punit; sed eos demum quorum facta circumstantiam habent singularem, ut cum qui princeps alios seduxerit. Deut. xiii. 1, 6, civitatem quæ incepit colere Deos ante ignotos,

et pulchra quæ habet Janiblichus post principium de mysteriis Ægyptiorum, ubi Deum nose ita homini ait proprium, ut hinnitum equo.

<sup>1</sup> Ita et coerceri posse arbitror nomine humanæ societatis] Moxus Lydus

Crambi urbis inhabitatores obsidione captos mersit omnes οἱον αἰθέρος, ut qui Deum nullum nossent,olerentve. Nicolaus Damascenus in excerptis Peirescianis. (Pag. 442.)

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object; not the world, not the sky, not the sun, not the air; that the world does not exist from eternity; not even matter, of which it is made, but that matter was created by God. Therefore, as to these points, the knowledge has been, among many peoples, obliterated by the lapse of time, and as it were extinct; and the more easily because the laws gave less attention to this point, as being that without which at least some religion might subsist.

2 Even the law of God, given to the Jewish people, who were imbued with a knowledge of these things, neither obscure nor uncertain, by the prophets, and by miracles, partly seen by themselves and partly delivered by clear tradition, still does not punish with death all who are convicted of this offense; but only those in whom there is some particular circumstance to aggravate the fact, or who have seduced others; as Deut. xiii. 1, 6; or the city which begins to

Rom. i. 25.  
p. 1031 B.

Deut. xiii. 12, 13, eum qui astra colit, ut legem totam, ac proinde Dei veri cultum deserat, Deut. xvii. 2, (quod Paulo est λατρεύειν τῇ κτίσει παρὰ τὸν κτίσαντα, *"opificio servire, non opifici"*: nam παρὰ ibi et alibi sēpe vim habet exclusivam) quae res etiam apud Esau posteros aliquo tempore pcenis fuit subdita, ut videre est Jobi xxxi. 26, 27, eum quoque qui liberos Molocho, id est, Saturno dederit, Lev. xx. 2.

Lev. ad Cat.  
p. 1031 B.

Acad. iv. 3.

3 Canaanæos vero et vicinos illis populos pridem delapsos ad pravas superstitiones non statim Deus puniendos judicavit, sed tum demum cum hanc culpam magnis sceleribus cumulascent, Gen. xv. 16. Sic et in aliis populis dissimulavit ignorantiae tempora circa falsorum numinum cultus, Actor. xvii. 30. Nimirum recte a Philone dictum est, religionem suam cuique videri optimam, ut quæ plerumque non ratione sed affectu dijudicetur: unde non longe abit dictum Ciceronis, nemini ullam disciplinam philosophiæ probari, præter eam

*[Opificio servire, non opifici]* Philo ad *Decalogum de Talibus*: εἰσὶ δὲ οἱ καὶ προσυπερβάλλοντις δοειδεῖς, μηδὲν τῶν ίσων μεγαδιδόντες, ἀλλὰ τοῖς μὲν τὰ πάντα τῶν ἐπὶ τιμῆ χαριζόμενοι, τῷ δὲ οὐδὲν νέμοντες, ἀλλ' οὐδὲ μνήμης τὸ κοινότατον αἰξιοῦνται ἐπιλήθουνται γάρ οὐ μόνον προσῆκουν ήν μεμνηθαί, ἐπιτηδεύοντες οἱ βαρυδαίμονες ἔκούσιον λάθην, &c. sunt autem alii quorum ulterius impietas procedit, qui ne parta quidem Deo et operibus ejus tribuant, sed quicquid honoris ex cogitari potest his exhibent, illud communissimum bonum nulla memoratione dignantes, id prætereunt quod solum me-

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worship strange gods, ver. 12, 13; or that worships the sun, or the moon, or the host of heaven, Deut. xvii. 3; (which St Paul calls serving the creature, and not the Creator, Rom. i. 25; and which also was at one time punished among the posterity of Esau, Job xxxi. 26, 27, [*If I beheld the sun when it shined, or the moon walking in brightness, and my heart hath been secretly enticed, or my mouth hath kissed my hand;*]) or that gave his children to Moloch, Lev. xx. 2; that is, to Saturn.

3 The Canaanites and the neighbouring peoples, who fell away to depraved superstitions, God did not straightway punish, but only at last, when they had accumulated great wickedness upon this transgression, Gen. xv. 16. [God says to Abraham, *In the fourth generation they shall come again; for the iniquity of the Amorites is not yet full.*] So in other nations also, God winked at the times of this ignorance, Acts xvii. 30. Philo says truly, that each one thinks his own religion the best, judging mostly, not by reason, but by affection; as Cicero says of philosophical doctrines. He adds, that most are involved in their religious belief, before they can use their judgment.

quam ipse sequatur. Addit, plerosque teneri adstrictos antequam quid esset optimum judicare possent.

4 Sicut autem excusabiles sunt et ab hominibus certe non puniendi, qui cum legem a Deo proditam nullam acceperint, aut astrorum, aut aliarum rerum naturalium virtutes, aut spiritus, sive in imaginibus, sive in animantibus, sive in rebus aliis colunt, aut etiam animas eorum qui virtute et beneficiis in humanum genus excelluerunt, aut mentes quasdam incorporeas, praesertim si nec ipsi tales cultus commenti fuerint, <sup>1</sup> nec summi Dei cultum ideo deserant; ita impiorum quam errantibus annumerandi sunt, qui aut cacodæmonas quos tales esse norunt, aut vitiorum nomina, aut homines, quorum vita fuit flagitiis plena, divinis honoribus colere instituunt.

5 Nec minus illi qui deos colunt hominum innocentum sanguine, a quo more quod Carthaginienses abstinere coegerit laudatur <sup>2</sup>Darius Persarum rex, et Gelo Syracusarum tyranus. Narrat et Plutarchus, barbaros quosdam, qui humanis

*minisse debuerant, sponte miseri sibi accrescentes queritam oblivionem,* (pag. 753 A. B. Ed. Paris.) Sic locum Deuteronomii interpretatur Maimonides *Direttore* III. 41.

<sup>1</sup> *Nec summi Dei cultum ideo deserant]* Sic victimas ab Ægypti regibus, ab Augusto, a Tiberio in Templum ad-

misere Judæi. Docent id et Josephus et Philo, [de Legat. ad Cai. p. 1036 c. Verum illi Reges et Principes non propria Deum Judeorum, ut unicum et summum, adgnoscabant; eadem sacra cuivis alii Numini oblaturi. J. B.]

<sup>2</sup> *Darius]* Hystaspis filius, Xerxes pater. Confer quæ supra § 41.

Just. xix. 1.  
Plut. Apoph.  
p. 175 A. et de  
sera num.  
vind. p. 552 A.  
Quæst. Rom.  
83.

4 As, then, those are excusable, and certainly not to be punished by men, who, not having received any law delivered by God, worship the influences or spirits of the stars, or of any other natural bodies, either in images, or in animals, or in other things; or even the souls of those who have excelled in virtue, and in benefits bestowed on the human race; or some incorporeal minds; especially if they have not themselves invented this worship, and therefore have not deserted for it the worship of the supreme God; so, on the other hand, they are to be reckoned impious rather than erroneous, who appoint divine honour and worship for evil demons, whom they know to be such, or for names of vices, or for men whose life was marked by wicked deeds.

5 Nor are they less to be reckoned impious, who worship gods with the blood of innocent men; which custom Darius of Persia and Gelo of Syracuse compelled the Carthaginians to discontinue, and are therefore praised. Plutarch relates that some barbarians, who worshipped the gods with human victims, were on the point of being punished by the Romans; but, having excused themselves by the antiquity of the

victimis deos colebant, poenas datus Romanis fuisse: sed cum antiquitate moris se excusarent, nihil mali passos: vetitos tantum nequid in posterum tale facerent.

XLVIII. 1 Quid de illis armis dicemus quæ inferuntur populis aliquibus, eam ob causam quod illi Christianam religionem sibi propositam amplecti nolunt? Non jam quæram antea talis proponatur qualis debet, et quomodo debet. Demus ita fieri: duo notanda dicimus. Prius est veritatem Christianæ religionis, quatenus scilicet naturali ac primævæ religione non pauca superaddit, argumentis mere naturalibus persuaderi non posse, sed niti historia tum resurrectionis Christi, tum miraculorum ab ipso et Apostolis editorum: quæ res est facti, olim quidem irrefragabilibus testimoniis probata, sed olim, ita ut et hæc quæstio facti sit, et jam perantiqui. Quo magis fit, ut doctrina hæc ab his qui nunc primum eam audiunt penitus in animum admitti nequeat, nisi secretis Dei auxiliis accedentibus, quæ sicut quibus dantur non dantur in operis alicujus mercedem, ita si quibus negantur aut minus large concedenduntur, id

\* *Nemini deinceps ad credendum vim inferre]* Josephus ita censet δεῖν ἔκαστον διθρωτού κατὰ τὴν ἑαυτοῦ προάρσιν θεόν εὐπεβεῖν, ἀλλὰ μὴ μετὰ βίᾳς debere quemque libero animi proposito Deum colere, non vi coactum. (In Vit. sua, p. 11. § 23. Edit. Huds. Tom. II.)

<sup>1</sup> *Quarum rerum causæ nos latentes causam assignare divinam voluntatem]*

Servius ad initium III. *Aeneidos*, (vers. 2.) *Quotiescumque ratio vel judicium non apparet, sic virum interponitur.* Sic et Donatus ad actum V. scena 2. *Eunuchi*, (vers. 36.) Atque in eum sensum ponit Hebreum γενι notat Abarbanel.

\* *Christo novæ legis auctori omnino hoc placuisse, ut ad legem suam recipiendam nemo hujus vite penitus, aut earum*

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custom, no harm was done them; but they were commanded not to do the like in future.

XLVIII. 1 What shall we say of making war on certain peoples because they will not embrace the Christian religion when offered to them? I will not now enquire whether it be proposed to them such as it ought to be, and in such manner as it ought to be. Suppose this: we have then two remarks to make. The first is, that the truth of the Christian religion, in so far as it adds not a few points to natural and primitive religion, cannot be proved by mere natural arguments, but rests both on the history of the resurrection of Christ, and on that of the miracles done by him and the apostles; which is a matter of fact, proved of old by irrefragable testimonies, but only of old; so that this also [the ancient testimony] is a matter of fact, and of very old fact. Hence this doctrine cannot be received by those who now hear it for the first time, without the assistance of secret help from God;

fit ob causas non iniquas illas quidem plerumque nobis incognitas, ac proinde humano judicio non punibiles. Huc respicit canon concilii Toletani: *Præcipit sancta synodus, Cap. 5. de nemini deinceps ad credendum vim inferre. Cui enim vult 45. Iudeis, dist.* Deus miseretur, et quem vult indurat. Mos enim est sacrorum librorum, quarum rerum causæ nos latent, eis causam assignare divinam voluntatem.

2 Alterum hoc est, Christo novæ legis auctori omnino hoc placuisse, ut ad legem suam recipiendam nemo hujus vitæ pœnis, aut earum metu pertraheretur, Rom. viii. 15; Hebr. ii. 15; Joan. vi. 67; Luc. ix. 55; Matth. xiii. 29, quo sensu verissimum illud Tertulliani: *Lex nova non se vindicat ultore gladio.* In libro antiquo, cui nomen Constitutiones Clementis Lub. vi. 22. de Christo, dicitur: τὸ αὐτεξόσιον τῶν ἀνθρώπων ἀφῆκεν ἐλεύθερον, οὐ προσκαίρῳ θανάτῳ δικάζων, ἀλλ' ἐν ἑτέρᾳ καταστάσει λογοθετῶν αὐτῷ liberam reliquit hominibus arbitrii potestatem, non morte temporali eos puniens, sed in altero sæculo ad reddendam rationem vocans. <sup>a</sup>Athanasius:

*metu pertraheretur]* Tractat hoc Gregorius Nazianzenus oratione. Cum assump-  
tus est a Patre: et Beda Lib. i. c. 26.  
Isidorus de Sisebuto rege: *Qui in initio  
regni sui Iudeos ad fidem Christianam  
permovens, emulacionem quidem Dei  
habuit, sed non secundum scientiam: po-  
testate enim compulit, quos provocare  
oportuit fidei ratione.* (Pag. 224. Edit.  
*Vulcan.*) Transcripsit hoc in historiam  
Rodericus 11, 13. Postiores in His-

pania reges eodem nomine culpant Oso-  
rius, et Mariana; quem vide xxvi. 13.  
xxvii. 5.

<sup>b</sup> Ita legitur locus, quem in animo  
habuit Auctor: *Nam vetus lex ultione  
gladii si vindicabat. . . . nova autem  
lex clementiam designabat.* Advers. Ju-  
deos, cap. 3. *J. B.*

<sup>c</sup> Athanasius] Epistola ad Solitarios  
(Tom. i. pag. 855 *l.*)

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and as this, when given, is not given as the reward of any work, so if it be denied, or given less largely, this is done for causes, not unjust indeed, but mostly unknown to us, and hence not punishable by human judgment. To this the canon of Toledo has respect. The Synod enjoins that henceforth no one suffer violence, to make him believe: For God will have mercy on whom he will have mercy, and whom he will he hardeneth. It is the manner of the scriptures, to ascribe to the divine will the things of which the causes are hid from us.

2 Another remark is, that it was the will of Christ, the author of the new law, that none should be urged to receive his law by the punishments of this life, or by their fear. [See the passages, Rom. viii. 15, *Ye have not received the spirit of bondage again to fear.* So Heb. ii. 15, *subject to bondage.* John vi. 67, *Will ye also go away?*]

*De Gubernat.  
Def. v. 2. p.  
102.*

3 <sup>k</sup> Hæreticus Augustino is demum qui alicujus <sup>l</sup> temporali commodi et maxime glorie principatusque sui gratia, falsas ac novas opiniones vel gignit vel sequitur. Audiamus de Arianis Salvianum: *hæretici sunt, sed non scientes: denique apud nos sunt hæretici, apud se non sunt: nam in tantum se Catholicos esse judicant, ut nos ipsos titulo hæreticas pravitatis infament.* Quod ergo illi nobis sunt, et hoc nos illis. Nos illos injuriam divinae generationi facere certi sumus: quod minorem Patre Filium dicant. Illi nos injuriosos Patri existimant, quod aequales esse credamus. Veritas apud nos est, sed illi apud se esse presumunt. Honos Dei apud nos est, sed illi hoc arbitrantur honorem divinitatis quod credunt. Inoficiosi sunt, sed illis hoc est summum religionis officium. Impii sunt, sed hoc putant veram esse pietatem. Errant ergo, sed <sup>m</sup> bono animo errant, non odio sed affectu Dei, honorare se dominum atque amare credentes. Quamvis non habeant rectam fidem, illi tamen hoc perfectam Dei aestimant caritatem; et qualiter pro hoc ipso falsæ opinionis errore in die judicii puniendi sint, <sup>n</sup> nemo potest scire nisi judex. Interim idcirco eis, ut reor, patien-

<sup>k</sup> *Hæreticus Augustino]* Libro de *Utilitate Credendi* (cap. 1) locus referatur in causam **xxiv.** questione 3. c. 28. Addit Augustinus, non idem sibi videri hæreticum et hæreticis credentem hominem. Vide eundem epistola **clxxii.** *Hæresis obstinationis animi dementia:* l. 2. c. *de summa Trinitate*, princ. [At illius pertinaciam solus Deus Judex est, ut ab Auctoribus, de quibus modo dixi, indicatum. J. B.]

<sup>l</sup> *Temporalis commodi et maxime glorie principatusque sui gratia]* Scriptor responsorum ad *orthodoxos* quæstione **iv.** (pag. 308. inter Opp. Justin. Martyr. Ed. Sylburg.) δῆλοι εἰσι ὅτι δε φιλοδέξιας ή ἀντιπάθειας τῶν αἰρεσιαρχῶν πάσαι al αἰρέσεις τὰς ἀφομέσι ἰσχήκαι τῆς συστάσεως αὐτῶν apertum est ex cupiditate gloria aut ex

*emulatu qui primos repertores agitavere, sectas omnes existendi originem ceperisse.* Chrysostomus ad Gal. v. η γαρ τὸν αἱρέσεων μήτηρ, η τῆς φιλαρχίας ἑστία ἐπιθυμία· mater hæresium, cupiditas principatus. (In vers. 18. pag. 754. Tom. III.)

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dicum potestate, et quos non potuisset verbis inducere, eos vi, plagis, carceribusque ad se pertrahere anniteretur : *atque ita*, inquit, *seipsam quam non sit pia, nec Dei cultrix manifestat*, respiciens ni fallor ad illud quod legitur <sup>P</sup>Gal. iv. 29. Similia habet Hilarius oratione ad Constantium. <sup>q</sup>In Gallia jam olim damnati sunt ecclesiæ judicio Episcopi qui ut in Priscillianistas gladio animadverteretur curaverant; et in oriente damnata Synodus quæ in Bogomili exustionem consenserat. Sapienter dixit Plato, <sup>r</sup>errantis pœnam esse, <sup>s</sup>doceri.

LI. 1 <sup>t</sup>Justius illi punientur qui in eos, quos Deos putant, irreverentes atque irreligious sunt. Atque hæc causa

*πόλει καὶ χώρᾳ εργάσαντο, δὲ λὰ πολλαῖς.* Veritatem docentes vexant, neque verbis evertunt, sed odiis, bellis, gladiis tradunt recte sentientes : exitum quippe jam non uni, sed multis urbibus regionibus attulere. De Talibus Gregorius episcopus Romanus ad Constantinopolitanum episcopum : (Lib. II. Ind. 2. Ep. 52.) *Nova et inaudita est ista prædicatio, quæ verberibus exigit fidem.* [Male quidem egerunt Ariani : sed non primi tam malum exemplum ediderunt. Jam antea Orthodoxi, ad eos vexandos impulerant Constantinum, ut ex *Historia Ecclesiastica* constat. J. B.]

<sup>P</sup> Gal. iv. 29.] Ad quem locum vide Hieronymum, citatum c. qui secundum, 13. causa xxiii. qœst. iv.

<sup>q</sup> In Gallia jam olim damnati sunt] Sulpicius Severus: *tum vero Idacius atque Ithacius acrius instare, arbitrantes posse inter initia malum comprimi :*

*sed parum sanis consiliis seculares iudices adeunt, ut eorum decretis atque executionibus heretici urbibus pellerentur.* (Lib. II. c. 47.) *Mox : securi etiam accusatores Idacius et Ithacius episcopi, quorum studium in expugnandis hereticis non reprehenderem, si non studio vincendi plus quam oportuisset certassent.* Ac mea quidem sententia est, mihi tam reos quam accusatores displicere. (Ibid. c. 50.) Postea : *Martinus apud Treviros constitutus non desinebat increpare Ithacium ut ab accusatione deristeret : Maximum orare, ut sanguine infelicium abstineret ; satis superque sufficere ut episcopali sententia heretici judicari Ecclesiis pellerentur.* Vide et sequentia.

<sup>r</sup> *Errantis pœnam esse, doceri]* Seneca in Tragedia (*Herc. Fur. vera.* 1237) :

*Quis nomen unquam sceleris erroris dedit ? et de Ira I. 14. non est prudentis erran-*

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in the judicial power against their adversaries; *This shews*, he says, *that their way is not pious*; referring, I think, to Gal. iv. 29: *As then, he that was born after the flesh persecuted him that was born after the spirit, even so it is now.* In Gaul, the bishops were condemned who used the sword against the Priscillianists; and in the east, the Synod which agreed to the burning of Bagomilus. (Plato says wisely, that the proper punishment of him who is wrong\*, is to be taught right).

LI. 1 Those may be more justly punished who are irreverent and irreligious towards those whom they believe to be gods. This cause among others was adduced for the Peloponnesian war between the

\* Plato says, *of ignorance.* J. B.

inter ceteras allata belli Peloponnesiaci inter Athenienses et Lacedæmonios, et a Philippo Macedone in Phocenses: de quorum sacrilegio sic Justinus: *quod Orbis viribus expiari debuit*. Hieronymus ad Danielis v. *Quamdiu vasa fuerunt in idolio Babylonis, non est iratus Dominus* (*videbantur enim rem Dei secundum pravam quidem opinionem, tamen divino cultui consecrasse*) *postquam autem humanis usibus divina contaminant, statim pœna sequitur post sacrilegium*. Nimirum et Augustinus existimat <sup>Thuc. i. 128, etc.</sup> <sup>Diod. xvi. 60, etc.</sup> <sup>Lib. viii. 2</sup> <sup>p. 581 n.</sup> <sup>\* auctum a Deo imperium Romanorum, quod cordi illis fuisse</sup>

*tes odisse: alioquin ipse sibi odio erit.* M. Antoninus libro IX. (§ 11. Edit. Gatak.) ei μὲν δύνασαι, μεταδίδασκε, εἰ δὲ μὴ, μέμνησο, ὅτι τρὸς τοῦτο ηὐμένεια σοι δέδοται· καὶ οἱ θεοὶ δὲ εὐμενεῖς τοῖς τοιούτοις εἰσίν. *si potes,* meliora doce: *si non potes, memento in hoc tibi lenitatem datam.* Ipsi Dii lenes sunt talibus. Chrysostomus Eph. iv. 17 (Tom. vi. pag. 828) τὸν γὰρ δύνοντα, οὐ κακὸς πάσχειν οὐδὲ ἔγκλεισθαι, δλλὰ μανθνεῖν δίκαιον ἐστιν ὅπερ δύνεται εὖν qui ignorat neque malo affici neque accusari oportet, sed æquum est ut discat quae ignorat. Valentianus, laudante Ammiano Marcellino libro XXX. nec quemquam inquietavit, neque ut hoc coleretur imperavit, aut illud; nec interdictis minacibus subiectorem cervicem ad id quod ipse coluit inclinabat, sed intemeratas reliquit has partes ut reperit. (Cap. 9.)

<sup>4</sup> Dicit Philosophus, *ignorantis; ignorantia autem cum errore magnam habet adfinitatem, et hic ab illa sepe oritur: Προσήκει δέ που [πάσχειν τῷ μῷ εἰδότι] μαθεῖν παρὰ τοῦ εἰδότος.* *De Rep. Lib. i. pag. 337 n. Tom. II. Ed. H. Steph. J. B.*

<sup>5</sup> *Justius illi punientur qui in eos, quos Deos putant, irreverentes atque irreligiosi sunt]* Vide de hac re egregia apud Cyrillum libro contra Julianum v. et vi. Solone auctore Amphictyones bello persecuti sunt Cirraeos, quod ii templo Delphico vim intulissent. Plutarchus Solone, (p. 83 n.) Sic et qui falso sibi vatum nomen induunt recte puniuntur: consule Agathiam lib. v. (Cap. 3.)

<sup>6</sup> Necio ubinam id dixerit Augustinus. Certe sic non satis sibi constat, quum ipse Lib. v. cap. xii. *De Civit. Dei* fuse satis ostendat, Romanorum

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Athenians and Lacedæmonians, and by Philip of Macedon against the Phocians: of whose sacrilege Justin says, that it required to be expiated by the arms of the whole world. Jerome says, on Daniel v. As long as the sacred vessels [of the Hebrews] were in the idol-temple at Babylon, God was not angry, (for they still seemed to be devoted to divine worship, though accompanied with perverted opinions;) but after that they were polluted by human uses, the punishment straightway follows the sacrilege.

Augustine thinks that the Roman Empire was favoured by God, because, though their religion was false, they were in earnest about it\*; and as Lactantius says, they held to the main duty of man,

\* Augustine says that the Roman Empire was favoured by divine Providence on account of their civil virtues, *De Civit. Dei*, Lib. v. c. 12. J. B.

quamvis falsa religio: et, ut Lactantius loquitur, summum hominis officium, etsi non reipsa <sup>et</sup>tamen proposito tenerent.

2 Et supra diximus qualiacunque quæ putantur numina pejerata a vero numine vindicari: *Punitur, quia tanquam Deo fecit*, ait Seneca: *opinio illum sua obligat pœnæ*. Sic accipio et illud Senecæ: *Violatarum religionum aliubi atque aliubi diversa pœna est: sed ubique aliqua*; et quod Plato capitdamnat religionis temeratores.

vii. de Ben. c. 7.  
De Benef. iii. 6.  
De Leg. lib. x. p. 307. et seqq.

Imperium auctum Providentia divina, non quod illis cordi fuisse, quamvis falsa Religio, sed ob eorum virtutes Civiles. J. B.

\* Locus est *Instit. Divin.* Lib. ii.

cap. 3. num. 14. *Ed. Cellar.* ubi Lactantius loquitur de Idololatria in universum. Neque locus Senecæ, qui mox sequitur, satis recte hec aptatur. J. B.

though not in truth, yet in purpose\*.

2 We have already said that even imaginary deities when appealed to by perjured persons, have their cause taken up by the true God. He is punished, says Seneca, because he did it, as to God; his own opinion binds him to punishment. And so I take that other passage of Seneca: The punishment of violating religion is different in different places, but some punishment there everywhere is. So Plato condemns those who do not believe in the existence of the gods, to imprisonment or death (*Laws*, b. x. end).

\* Lactantius is speaking of idolatry in general: *Instit. Div.* Lib. ii. c. 3. The passage from Seneca is not appropriate. J. B.

## CAPUT XXI.

### DE PŒNARUM COMMUNICATIONE.

- I. *Paena quomodo transeat ad eos qui delicti sunt participes.*
- II. *Communitas aut rectores tenentur ex subditi delicto, si adsit scientia et non prohibitio cum prohibere possint et debeant:*
- III. *Item ex receptu eorum qui alibi deliquerunt.*
- IV. *Nisi aut puniant aut demandant: quod exemplis illustratur.*
- V. *Jura supplicum ad infornatos, non ad nocentes pertinere: cum exceptionibus.*
- VI. *Defendit tamen supplices dum de causa cognoscatur: et ex quo jure facienda cognitio.*
- VII. *Quomodo delicti rectorum participes sint subditi, aut communitatis hi qui ejus membra sunt: et quomodo differant pœna communitatis et pœna singulorum.*
- VIII. *Pœna jus in universitatem quamdiu duret.*
- IX. *An sine delicti communicatione pœna transeat.*
- X. *Distinctio ejus quod directo infertur et in consequiam venit.*
- XI. *Distinctio ejus quod fit occasione peccati et quod ex causa peccati.*
- XII. *Proprie loquendo neminem juste punire ob delictum alienum, et cur?*
- XIII. *Non filios ob parentum delicta:*
- XIV. *(Respondeatur ad Dei facta [vel potius, ad objectionem petitam ex Dei factis] circa filios nocentum.)*
- XV. *Multo minus cognatos alios.*
- XVI. *Posse tamen liberis et cognatis nocentum aliquid negari, quod aliqui habere poterant: cum exemplis.*
- XVII. *Nec subditos proprii puniri posse, ob regis delictum:*
- XVIII. *Nec singulos qui non consenserunt, ob delictum universitatis.*
- XIX. *Hæredes ad pœnam, qua pœna est, non teneri: et cur?*
- XX. *Teneri tamen si pœna in aliud debiti genus transierit.*

I. 1 **Q**UOTIES de pœna communicanda quæritur<sup>1</sup>, aut de iis quæritur <sup>2</sup>qui delicti sunt participes, aut de aliis. Qui delicti participes, non tam ex alieno quam ex suo

<sup>1</sup> Confer heic PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. VIII. c. iii. § 28. et seqq. ac cap. vi. § 12. *J. B.*

<sup>2</sup> *Qui delicti sunt participes*] Ter-

tullianus de Resurrectione Carnis: dicent enim ministros et socios habere arbitrium ministrandi atque sociandi, et potestatem sue voluntatis in utrumque, homines

### CHAPTER XXI. *Of the Punishment of Accessories.*

I. 1 When we speak of the extension of punishment from one person to others, we speak either of those who are partakers in the

delicto puniuntur. Hi qui sint ex his quæ supra de damno injuria dato dicta sunt intelligi potest. Ferme enim iisdem modis in delicti partem quis venit quo in damni dati: non tamen semper, ubi damni obligatio est, etiam delictum est, sed tum demum si qua malitia notabilior accesserit, cum ad damni dati obligationem sœpe qualiscumque culpa sufficiat.

2 Ergo <sup>b</sup>qui factum vitiosum jubent, qui consensum requisitum adhibent, <sup>c</sup>qui adjuvant, <sup>d</sup>qui receptum præstant, aliove modo in ipso crimine participant: <sup>e</sup>qui consilium dant, <sup>f</sup>laudent, assentantur: qui cum ex jure proprio dicto teneantur vetare <sup>g</sup>non vetant, aut cum teneantur ex simili jure opem ferre injuriam patienti non ferunt: qui non dissuadent

*scilicet et ipsos; Idecirco cum auctori-  
bus merita communicare, quibus operam  
sponte accommodant.* (Cap. 16.)

<sup>b</sup> Qui factum vitiosum jubent, qui consensum requisitum adhibent] *Saulus manibus omnium lapidabat.* Augustinus sermone v. de Sanctis, cap. 4. similis sermone ejusdem argumenti primo, c. 3. et sermone xiv. [Qui omnes Sermones falso adscripti sunt Augustino.]

<sup>c</sup> Qui adjuvant] Ope. *Institutionibus de furtis,* [immo *De Obligat. ex delict.*] § interdum, ii. *Editio Theude-  
rici,* c. 120.

<sup>d</sup> Qui receptum præstant] Hieronymus [aut quisquis aliis scripsit opus illud, p. 53 d. Tom. vii. Ed. Bas. in cap. 29] super parabolæ: *non fur so-  
lum, sed ille reus tenetur qui furti con-  
scius querente possessore non indicat.*

*Chrysostomus de Statuis xiv. où γὰρ οἱ ἀποικοῦντες μόνον, ἀλλὰ καὶ οἱ συνειδότες μὲν, περιστέλλοντες δὲ, κοινωνοῦσι τὸν ἐγκλημάτων· non enim perjurii soli, sed et qui, consciū cum sint, celant perjuria, criminis tenentur.* (Tom. vi. pag. 555, 556. *Edit. Savil.*)

<sup>e</sup> Qui consilium dant] Vide *Institu-  
tiones et Editio Theude-  
rici dictio locis.* Andocides ex lege Attica, τὸν βουλεύ-  
σαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῷ χειρὶ ἔργασάμενον qui consilium dedit eum non minus pena teneri quam qui manu rem efficerit: [Orat. i. *De Mysteriis,* pag. 219. Ed. Wech.] où γάρ ην πραχθῆναι μηδ βουλευαμένου neque enim sine consilio res facta fuisset, ait Aristoteles *de Poetica* cap. 17. [Im-  
mo de Rhet. I. 7.]

<sup>f</sup> Laudent, assentantur] Chrysosto-  
mus i. ad Romanos circa finem: καὶ γὰρ

delict, or of others. Those who are partakers in the delict are not punished so much for another's delict as for their own. Who these are, may be understood from what has been said above concerning damage wrongfully inflicted. For generally, a person comes to be a sharer in the delict, in the same way in which he comes to be a sharer in the damage done; yet it is not always true that when a person is bound for the damage, he is also liable to punishment; but only when there has been, besides, some notable malice; whereas to make a person bound for the damage, any fault whatever often suffices.

2 Therefore they who command a vicious act, they who give the consent which is requisite, they who assist, who receive the things, or in any other way participate in the crime itself; they who give their counsel towards it, who praise it, who assent to it; those who being bound

cum dissuadere debeant: qui factum reticent quod notum facere ex jure aliquo tenebantur; hi omnes puniri possunt, si in ipsis talis sit malitia quæ ad meritum poenæ sufficiat, secundum ea quæ proxime tractata sunt.

II. 1 Exemplis res fiet illustrior. Communitas ut alia ita et civilis non tenetur ex facto singulorum, sine facto suo, aut omissione: bene enim Augustinus; *aliud est quod in populo quisque habet peccatum proprium, aliud quod commune, quod uno animo fit, et una voluntate ad aliquid multitudine comparata committitur.* Hinc in formula fedrum est: <sup>In Levit. Quæst. 26.</sup> <sup>b</sup> *Si defexit publico consilio.* Locri apud Livium <sup>Lib. xxix. 17.</sup> ostendunt senatu Romano culpam defectionis procul a consilio

τοῦ πλημελοῦντος ὁ τὴν ἀμάρτιαν καταινῶν χαλεπώτερος pejor peccante qui peccatum laudat. (Tom. III. pag. 28.) Qui facinorosum adstant hortatur, pro faciente habetur lego Langobardica, Lib. I. tit. ix. § 25. Vide quæ ex Philone et Josepho mox proferemus ad § 17.

<sup>a</sup> Non vetant] Chrysostomus I. *adversus Judæos:* (Tom. vi. pag. 319.) ὥσπερ οὖν οὐχ οἱ κλέπτοντες μόνον, δλλὰ καὶ οἱ κύριοι μὲν ὅπτες κωλύσαι, μηδ κωλύσοντες δὲ τὴν αὐτὴν ἐκείνους διδόσαι δίκην· sic non ἡ modo qui fursum fecere, sed et qui prohibere cum posset non prohibuere, puniuntur, et quidem pari uterque pæna. Sic eum qui sanari segratum prohibet, teneri quasi vulnerasset, ait idem Chrysostomus II. ad Cor. c. vii. (Tom. III. p. 627.)

<sup>b</sup> *Si defexit publico consilio]* Chrysostomus de *Statuis* III. ὅτι οὐ κοινὸν τῆς πόλεως τὸ ἀμάρτημα γέγονεν, ἀλλὰ ἀνθρώπων τινῶν ξένων καὶ ἐπηλύδων, οὐδὲν λογισμῷ ποιούντων, ἢ τόλμη καὶ παρανομία πάσῃ. καὶ εἰκ ἀνεῖ δίκαιον ὑπὲρ τῆς ὀλίγων ἀπαιδευτίας πολὺν τοσαύτην ἀναρτᾶσσεθαι, καὶ τοὺς οὐδὲν ἡδικηκότας διδόναι δίκην. *Non commune fuisse delictum civitatis, sed extraneorum et advenarum, qui cuncta temeritate ac legum ignorantia potius quam ratione facerent: neque vero aquum, ut ob paucorum imperitiam tanta urbs everteretur et pænam ferrent culpæ excessores.* (Tom. vi. pag. 473.) Ammianus libro XXX. de *Quadiis:* nihil ex communi mente procerum gentis delictum asseverantes in nostros. (Cap. 6.)

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by their special rights to forbid it, do not forbid it; or being bound by similar rights to give aid to the person who suffers wrong, do not do so; those who do not dissuade when they ought to dissuade; who keep silence with regard to a fact which they were bound by some right to make known; all these may be punished, if there be in them such malice as suffices for penal desert, according to what has already been said.

II. 1 The thing will be made clearer by example. A Civil Community, like any other Community, is not bound by the act of an individual member thereof, without some act of its own, or some omission. Augustine says well, *There is a difference between the fault that, in a people, each person has of his own; and a fault common to all, which is committed with one mind and one will.* And accordingly, in

*Apud quend. xlv. ss.* Lib. xxxv. 31. publico abfuisse. Narrante eodem, Zeno pro Magnetibus deprecator apud T. Quintium et legatos qui ei aderant flens petebat, ait Livius, *ne unius amentiam civitati assignarent; suo quemque periculo furere.* Et Rhodii apud senatum publicam causam a privatorum causa segregant, dicentes, *nullam esse civitatem quae non improbos cives aliquando, et imperitam multitudinem semper habeat.* Sic nec pater ex delicto liberorum tenetur, nec dominus ex servi, nec alii qui præsunt, nisi aliquid in ipsis vitiosum hæreat.

Cap. 5.

*Epist. 55. ad Brut.**Paracel. c. 26.**Adv. Gent. iv. p. 149.  
De Gubern. Dei. v. 19.  
In fin.*

2 Ex his autem modis quibus rectores aliorum in crimen veniunt, duo sunt qui maximum usum habent, et diligent consideratione indigent: patientia et receptus. De patientia ita habendum est, qui scit delinqui, qui prohibere potest et tenetur, nec prohibet, eum ipsum delinquere. Cicero in *Pisonem: neque vero multum interest, præsertim in Consule, utrum ipse perniciose legibus, improbis concionibus rempublicam vexet, an alios vexare patiatur.* Brutus ad Ciceronem: *alienæ igitur, inquies, culpoz me reum facies? prorsus alienæ, si provideri potuit ne existeret.* ίσον τῷ πλημμελεῖν τὸ μὴ κωλύειν τοὺς πλημμελοῦντας, ait Agapetus ad Justinianum; *par est delinquere et delinquentes non prohibere.* *Quisquis patitur peccare peccantem, is vires subministrat audacie,* ait Arnobius. *In cuius manu est ut prohibeat, jubet agi si non prohibet admitti,* ait Salvianus. Augustinus vere: *qui desinit obviare cum potest, consentit.*

Treaties the formula is, [Liv. i. 24.] *If he violate this by public act.* The Locrians in Livy plead to the Roman Senate that their defection was by no means a public act. So again Zeno, pleading for the Magnesians, begged with tears that they would not ascribe to the whole city the insanity of one man: that each one's madness must be at his own risk. And the Rhodians, before the Senate, separate the public cause from that of private persons, saying that there is no city which has not often wicked citizens, and always a senseless mob. So the father is not bound by the delict of the son, nor the master by that of the servant, except there be some cause of blame in themselves.

2 But of the ways in which rulers come to share in the crime of others, there are two which are most common, and require diligent consideration: their allowing and their receiving.

With regard to *allowing*, it is to be held that he who knows of the commission of the offense, who can, and is bound to prevent it, and who does not, does himself offend. So Cicero against Piso; Brutus, in a letter to Cicero; Agapetus to Justinian; Arnobius; Sal-

3 Sic qui mancipium cum possit eximere prostitutum esse patitur, pro prostituente habetur Romanis legibus. Si servus sciente domino occidit, in solidum dominum obligat: ipse enim videtur dominus occidisse. Et lege Fabia in dominum animadvertisit: si servus domino sciente alienum servum subduxerit. Paul. Lib. v. sent. Tit. 30. § 2.

4 Sed, ut diximus, praeter scientiam requiritur facultas prohibendi. Et hoc est quod aiunt leges <sup>1</sup>scientiam, cum puniri jubetur, accipi pro patientia, ut qui prohibere potuit teneatur si non fecerit; et scientiam hic spectari quæ habeat et voluntatem: scientiam accipi cum consilio: ideoque non teneri dominum si servus in libertatem proclamaverit, si dominum contemserit: quia scilicet culpa vacat qui scit quidem, sed prohibere non potest. Sic parentes tenentur ex delictis filiorum, sed eorum demum quos habent in potestate. Vicissim, etiamsi in potestate habeant et alioqui prohibere potuerint, non tenebuntur nisi et sciverint. Pariter enim concurrent haec debent, scientia et non prohibitio, ut quis ex facto alieno teneatur: quæ omnia ad subditos pari ratione sunt referenda: veniunt enim ex naturali aequitate. L. 1. § 1. si  
sam. Art. 1.  
L. 4. de nos.  
act.  
L. 50. de R.  
J. L. 109. eo  
tit.  
L. 1. § qui  
cum. in fine  
l. 13. § 1. l.  
18. D. qui  
not. inf.  
L. 7. § 6. D.  
Arbor. Art  
ceasar.

5 Egregie Proclus ad illud Hesiodi (*Oper. et Dier.* p. 61 vers. 240):

<sup>1</sup> *Scientiam, cum puniri jubetur, accipi pro patientia]* Lega Wisigothorum libro viii. tit. iv. cap. 11. cap. 26. et alibi. libro ix. tit. 1. c. 1.

vian; Augustine.

3 So he who allows his slave to be prostituted when he could prevent her, is held by the Roman Law to have prostituted her. If a slave commit homicide with the knowledge of his master, the master is equally liable, for he is considered as guilty of the homicide. And by the Fabian law, the master is punished if his servant, with his knowledge, has drawn away and secreted another servant.

4 But as we have said, there is required, to produce this liability, not only knowledge, but the power of prevention. And this is what the Laws say; that knowing, when it is directed to be punished, is taken for allowing; so that he who could have prevented, is held bound if he did not do so; and that the knowing here spoken of is considered as combined with willing; and that knowledge is taken along with purpose; and therefore, that the master is not bound if the slave has asserted and appealed to the laws for his liberty; or, if he have disregarded his master; for he is blameless who knows, but cannot prevent.

5 When Hesiod says,

Often the whole of the city is punished for one man's injustice,

Πολλάκι καὶ ξύμπασα πόλις κακοῦ ἀνδρὸς ἐπαυρεῖ·

Στέρε luit populus pœnas unius iniqui,

ait: *ως ἔξὸν κωλύειν, μὴ κωλύονσα τὴν τοῦ ἑρὸς πονηρίαν,*

*ut qui cum prohibere possit non prohibet unius malitiam.*

Sic in exercitu Graecorum, ubi Agamemnon ipse et alii conci-

Horat. Lib. i. lio communi suberant, non immerito :

Epist. ii. 14.

Quidquid delirant reges, plectuntur Achivi:

<sup>Virg. En. I. 30.</sup> **I**psorum enim erat cogere Agamemnonem, ut sacerdoti filiam redderet. Sic post eorundem classis exusta narratur :

<sup>1</sup> Unius ob culpam et furias Ajacis Oilei,

qua de re Ovidius *Metam.* xv. (vers. 468):

Virgine rapta

Quam meruit pœnam solus, digessit in omnes;

quia ceteri non impedierant, ne virgo sacerdos raperetur.

Liv. I. 14.

Apud Livium est: *Propinqui regis Tatii legatos Laurenti*

<sup>k</sup> *Ipsorum erat cogere Agamemnonem]* Ita hanc rem explicat Cyrilus libro v. contra Julianum, (pag. 175. Edit. Spanhem.)

<sup>1</sup> *Unius ob culpam et furias Ajacis Oilei]* Euripides *Troadibus* sic loquuntur Neptunum facit (vers. 70):

Oīs, ἥνιοι' Αἴας εὐλατος Κασσάνδραν βίη.

Cum Phœbādem vi traxit Ajacis manus.

Et Minervam respondens (vers. 71):

Κούδεν γ' Ἀχαιῶν ἴταθεν, οὐδὲ ἥκουσ' ὑπο.

Nilque audit, nil passus a Græcia mall est.

Pari jure omnes Antiochenos statuarum criminis involvit Chrysostomus, prima [Immo ii. p. 464, 465. Tom. v.] ejus argumenti oratione: ίδον τὸ ἀμάρτημα γέγονεν δλίγων, καὶ τὸ ἄγκλημα γίνεται κοινόν. ίδον δὲ ἐκείνους ἄπαντες

δεδοίκαμεν νῦν καὶ τῶν ἐκείνοις τετολμημένων αὐτὸν τὰς τιμωρίας ἀναμένομεν. εἰ δὲ προλαβόντες αὐτὸς ἔξεβάλομεν τὴν πόλεως, καὶ τὸ πενοστός διερθώσαμεν μέλος, οὐκ ἀν τὸν παρόντα ἐφοβύσσαμε φόβον. *Ecce fascinus paucorum fuit, accusatio in omnes fertur.* Ecce propter illos nunc in metu omnes sumus, et eorum qua illi ausi sunt pœnam nos ipsi spectamus. Quod si anteverissimes eam, illos de urbe pellendo, et partem morbidam sicut oportet trascensemus, abesset jam a nobis hic timor: deinde: δι' αὐτὸν οὖν τοῦτο κολᾶσσον, φησι, δίδου δίκην τὴν ἐσχάτην, διτε μὴ παρῆς, μηδὲ ἐκώλυτε, μηδὲ τοὺς ἀκοσμοῦντας κατείχετε, μηδὲ ἐκιδύνευετε πέρι τῆς εἰς τὸν βασιλέα τιμῆς. οὐ με-

Proclus says well, *As having had it in their power to prevent him, and not having done so.* So Horaco of Agamemnon,

Though 'tis the kings that are mad, the Achaians suffer the evil.

For they might have compelled him to restore the priest his daughter. And so after the Greek fleet was burnt,

All for the fault of one, for the madness of Ajax Oileus.

As Ovid says on the same subject,

One constrained the maid, but the penalty spread to the many:

because the others did not prevent the sacred virgin from suffering violence. So Livy about the Laurentian ambassadors, repelled by

*tium pulsant. Cumque Laurentes jure gentium agerent, apud Tatium gratia suorum et preces plus potuerunt. Igitur illorum pœnam in se vertit.* Huc proprie pertinet illud Salviani de regibus: "Potestas magna et potentissima, quæ prohibere scelus maximum potest, quasi probat debere fieri si sciens patitur perpetrari. Et apud Thucydidem est: ὁ δυνάμενος παῦσαι, ἀλλιθέστερον δρᾶ· magis ille facit, qui potest prohibere. Sic apud Livium Veientes et Latini Romanis se excusant, quod hostes eorum a subditis suis adjutū essent, se insciis. Contra Teutæ reginæ Illyriorum non accipitur excusatio, quod diceret non a se, sed a subditis piraticam exerceri: neque enim prohibebat. "Olim ab Amphictyonibus damnati Scyrii, quod suorum quosdam piraticam exercere patiebantur.

### 6 Sciri autem facile est ut præsumantur quæ conspicua

τέσχες τῶν τετολμημένων; ἐπαυνῷ τοῦτο καὶ ἀποδέχομαι. ἀλλ' οὐδὲ ἐπέσχε τὰ γενόμενα τοῦτο κατηγορίας ἀξιον· οὐ hoc ipsum, inquit, fer penas, et ultima luce supplicia quod non adfisti, quod non prohibuisti, quod insanentes non retinuisti, quod pericula non subiisti pro honore Imperatoris. Particeps non fuisti facinorum? Laudo hoc, et boni accipio: sed nec quæ slobant impediisti; hoc vero jam dignum accusari.

"Potestas magna et potentissima, quæ prohibere scelus maximum potest] Philo in Flaccum, (pag. 970 B.) ὁ γάρ ἐπιπλήττει ἡ τὸ πανύστατον ἐπέχειν ἀν δυνῆσθε, εἰ μὴ κεκάλυκε, δῆλος ἡν ἔψισι καὶ ἐπιτρέπων αὐτὸς nam qui castigare, certe inhibere potuit; εἰ non impedit, habendus est permisso aut

etiam probasse quod agebatur. Dion Galba: τοῖς μὲν γάρ ιδιώταις ἀπόχρη μηδὲν ἀδικεῖν. τοῖς δὲ δὴ τὰς ἡγεμονίας ἔχουσιν διάγκη προνοεῖν ὅτας μηδὲν ἄλλος κακουργεῖ. Privatis sufficit non delinquere: in imperio agentibus incombēt et hoc curare ne delinquat alius, (pag. 199 B. Ed. H. Steph.) In c. 4. Synodi Pistentis positæ inter capitula Caroli Calvi habemus: Non est liber a consensu qui quod emendare potest emendare negligit: quapropter sine dubio peccati se participem facit. Vide Nicetam Choniatem libro II. de Andronico. (Cap. 3.)

"Olim ab Amphictyonibus damnati Scyrii] Plutarchus Cimone, (pag. 483 c.)

Tatius. So Salvian speaks of kings. And Thueydides says, *He who could prevent it does it.* So in Livy, the Veientes and Rutulians excuse themselves to the Romans, in that their subjects had assisted the enemies of the Romans, they having no knowledge of the fact. And on the other hand, the excuse of Teuta, the queen of the Illyrians, is not accepted, when she said that piracy was not practised by her, but by her subjects; for she did not prevent it. And in ancient times the Scyrians were condemned by the Amphictyons because they allowed some of their people to practise piracy.

6 It is easy to know, so far as presumption goes, acts which are conspicuous and which are frequent. What is done by many, can be

p. 333, 354.  
Lib. iv. 27.

sunt, quæ frequentia, τὸ ἐκ πολλῶν συμβαῖνον, ἀνάγκη μηδένα ἀγνοεῖν: id quod a multis fit, necesse est a nemine ignoretur, ait Dion Prusæensis Rhodiaca. Αἰτολος graviter reprehendit Polybius, quod cum hostes Philippi videri nollent, suos tamen palam paterentur agere hostilia, et eorum qui talia facerent principes honoribus ornarent.

III. 1 Veniamus ad quæstionem alteram de receptu aduersus pœnas. Pœnas, ut ante diximus, naturaliter cuivis, cui nihil simile objici potest, exigere licet. Institutis civitatibus id quidem convenit, ut singulorum delicta, quæ ipsorum cœtum proprie spectant, ipsis ipsarumque rectoribus pro arbitrio punienda aut dissimulanda relinquenterunt.

2 At non etiam jus tam plenum illis concessum est in delictis, quæ ad societatem humanam aliquo modo pertinent, quæ persequi ita civitatibus aliis earumve rectoribus jus est, quomodo in civitatibus singulis de quibusdam delictis actio datur popularis: multoque minus illud plenum arbitrium habent in delictis, quibus alia civitas aut ejus rector peculiariter læsus

<sup>° Qui culpa est compertus]</sup> Dediti-  
onem enim præcedere debet causa cog-  
nitio: non deceat ἀκριτους ἐκδιδόνας,  
homines dedere causa non cognita. Plu-  
tarchos Romulo, (pag. 21 c.) Rex Sco-  
ttie apud Camdenum in anno LXXXV.  
ait Elizabethæ, transmissuram se in An-

gliam Fernihurstium, imo et Cancella-  
rium, si præcogitate securitatem vio-  
lasse vel cœdem consciisse liquidis et  
legitimis probationibus convincerentur.  
<sup>P Hoc enim illud est dedere, quod in</sup>  
<sup>historiis sapissime occurrit]</sup> Mithrida-  
tem & Tigrane poposicte Lucullus, et non

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ignored by none, as Dio Prusæensis says. Polybius heavily blames the Etolians, because, when they were desirous of not being deemed the enemies of Philip, they allowed their people to commit hostile acts, and gave distinguished honours to those who had been prominent in such proceedings.

III. 1 Let us come to the other question, of receiving, as a subject of punishment. Punishment, as we have said, according to Natural Law, may be inflicted by any one who is not open to a like charge; though no doubt it is in conformity with civil institutions, that the delicts of individuals, which regard their own community, should be left to that community, and to its rulers, to be punished or passed over as they choose.

2 But there is not the same full power left to them in delicts which in any way pertain to human society in general: for these, other states and their rulers may prosecute, as in particular states there is a prosecutor of certain offenses which any one may put in motion: and much less have they such a power in offenses by which another state or its ruler are especially assailed; and in which, con-

est: et quo proinde nomine ille illave ob dignitatem aut securitatem suam jus habent pœnæ exigendæ, secundum ea quæ ante diximus. Hoc ergo jus civitas, apud quam nocens degit, ejusve rector impedire non debet.

IV. 1 Cum vero non soleant civitates permittere ut civitas altera armata intra fines suos pœnæ expetendæ nomine veniat, neque id expediat, sequitur, ut civitas, apud quam degit <sup>o</sup>qui culpæ est compertus, alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitrio interpellantis: <sup>p</sup>hoc enim illud est dedere, quod in historiis sæpissime occurrit.

2 Sic Israëlitæ alii a Benjaminitis postulant, ut dedant facinorosos, Jud. xx. Philistæ ab Hebræis, ut Samsonem quasi maleficum sibi dedant, Jud. xv. Sic Lacedæmonii Mes- <sup>Paus. iv. 4.</sup>  
<sup>Strab. VIII.  
P. 362.</sup> seniis bellum intulerunt, quod interfectorum quendam Lacedæmoniorum non dederent: et alio tempore ob non deditos eos qui missis ad sacrum virginibus vim intulerant. Sic Cæsarem Germanis, ob bellum injuste illatum, dedi voluit Cato. <sup>q</sup>Sic

dedenti bellum intulit; Appianus *Mithridatico*, (pag. 228. *Ed. H. Steph.*) et Plutarchus *Lucullo*, (pag. 505.) Romanii Salyas ab Allobrogibus dedi sibi postularunt; Appianus excerptis legationum xi. De Episcopo quem Romanii dedere Scythis volebant, vide Priscum excerpto legationum 21. [Scil.

<sup>pag. 21. *Ed. Hæschel.* et initio Excerpt. Prisci.] Dux Beneventanus a rege Vascone deditus Ferdinando Castellam regenti. *Mariana* xx. 1.</sup>

<sup>q</sup> Sic *Fabios sibi dedi Galli postulabant*] Plutarchus *Camillo*, (pag. 136, 137.) Appianus excerpto legationum 9.

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sequently, the state or the ruler have, on account of their dignity or security, a right of exacting punishment, as we have said. This right is not to be impeded by the state in which the offender lives, or its ruler.

IV. 1 But since states are not accustomed to permit another state to enter their territory armed for the sake of exacting punishment, nor is that expedient; it follows that the city, where he abides who is found to have committed the offense, ought to do one of two things: either itself, being called upon, it should punish the guilty man, or it should leave him to be dealt with by the party who makes the demand: for this is what is meant by *giving him up*, so often spoken of in history.

2 Thus the Israelites demand of the Benjamites, that they give up those who have committed the crimes; Judges xx. The Philistines require from the Hebrews that they give up Samson as an evil-doer; Judges xv. So the Lacedæmonians made war upon the Messenians because they did not give up a man who had killed Lacedæmonians:

Fabios sibi dedi Galli postulabant, quod in se pugnassent. Ab Dion. Halle. Hernicis agri sui populatores dedi sibi postularunt Romani; vili. 64.

Jugurth. et a Poenis Amilcarem, non illum nobilem ducem, sed alium qui Gallos concitabat: <sup>1</sup>postularunt et postea Annibalem: item Jugurtham a Boccho his apud Sallustium verbis: *simul nobis demeres acerbam necessitudinem pariter te errantem et illum sceleratissimum persecui.* Ab ipsis Romanis dediti qui Car-

Liv. xxxviii. 42. Val. Max. vi. thaginionsum, quique Apolloniarum legatis manus intulerant.

Liv. xxxviii. 51. Achæi a Lacedæmoniis dedi sibi postularunt eos, qui Lan vicum oppugnassent, addito, ni dederentur violatum videri fedus. Sic Athenienses per præconem pronuntiarunt, si quis

Diod. Sic. xvi. 53. Philippo insidias struxisset, et Athenas configisset, *παραδοσιον είναι, in eo statu esse ut dedi deberet.* Boeoti ab Hippotensibus exegerunt, ut qui Phocum interfecerant, dederentur.

Plut. Narr. amar. pp. 774, 775. 3 Quæ omnia tamen sic intelligenda sunt, ut non stricte populus aut rex ad dedendum teneatur, sed ut diximus ad dedendum aut puniendum. Nam ita legimus Eleos bellum intulisse Lacedæmoniis, <sup>2</sup>quod illi in eos qui Eleis injuriam

<sup>1</sup> Postularunt et postea Annibalem] Diodorus Siculus in fragmentis, (e Lib. xxv.) Livius. [Vide not. 32. Gronovii.]

<sup>2</sup> ALBERICUS GENTILIS, Lib. i. De

Jure Belli, cap. 21. p. 163. a quo hoc exemplum, ut alia quedam, mutuatus est Auctor noster, in margine testem indicat PAUSAN. Lib. vi. Locus est non longe ab initio libri, seu cap. 2. ubi ta-

and, at another time, because those were not given up who had done violence to virgins sent to perform a sacred office. So Cato advised that Cesar should be given up to the Germans, for wrongfully making war upon them. So the Gauls demanded that the Fabii should be given up to them, because they had fought against them. The Romans required those who had plundered their land to be given up to them by the Hernici; and Amilcar, by the Carthaginians, not the celebrated general, but another, who stimulated the Gauls: they afterwards demanded Annibal; and Jugurtha from Bocchus, that, as Sallust puts it, *you may relieve us from the painful necessity of punishing at the same time, you who are in error, and him who is most criminal.* The Romans themselves gave up those who had done violence to the ambassadors of the Carthaginians; and again, of the Apolloniates. The Achæans required the Lacedæmonians to give up those who had attacked the town of Las, adding, that if they did not do so, the league was violated. So the Athenians proclaimed by a herald, that if any one practised secretly against Philip, and then fled to Athens, he would be liable to be given up. The Boeotians required of the Hippotians that those who had slain Phocus should be given up.

fecissent non animadverterent, id est, nec animadverterent nec reos dederent: est enim disjunctiva obligatio.

4 <sup>5</sup> Interdum sontes depositibus optio datur, quo cumulatius satisfiat. Cœrites apud Livium Romanis significant: <sup>Liv. vii. 20.</sup> transeuntes agmine infesto per agrum suum Tarquinianas, cum præter viam nihil petiissent, traxisse quosdam agrestium populationis ejus, quæ sibi crimini detur, comites: eos seu dedi placeat, dedere se paratos esse, seu supplicio affici, daturos pœnas.

5 In federe Carthaginensium et Romanorum secundo, quod apud Polybium extat, locus male vulgo et distinctus et <sup>Lib. iii. 24.</sup> versus: *εἰ δὲ μὴ, ιδίᾳ μεταπορεύεσθω· εἰν τέ τις τοῦτο ποιήσῃ, δημόσιον γινέσθω τὸ ἀδίκημα· νι id fiat* (quid id sit incertum est: nam quæ præcedunt sunt mutila) *privatum quisque jus suum persequitor.* *Id ubi fecerit* (nimirum ni jus reddatur) *publicum delictum habetor.* Eschines in re-<sup>p. 202 n.</sup> sponsio adversus accusationem Demosthenis de male obita legatione, narrat se, cum apud Philippum Macedonem ageret

men simpliciter dicitur, ob verbera inflicta Lichas Lacedæmonio (non autem Eleo) jussu Hellanicorum, bellum ordinatum esse inter Lacedæmonios et Eleos. Sic Auctor minus accurate rem retulit,

quam ille, a quo exscribat non inspecto primo Auctore. J. B.

<sup>6</sup> *Interdum sontes depositibus optio datur]* Vide fedus inter regem Anglie et Danie, memoratum Pontano de mari.

3 All which passages, however, are so to be understood that the people or the king are not strictly bound to give up the person, but, as we have said, to punish him. For thus we read that the Eleans made war on the Lacedæmonians, because they had not punished those who had done injury to the Eleans; that is, they neither punished them nor gave them up. It is a disjunctive obligation.

4 Sometimes the option is given to those who demand the guilty, that the satisfaction may be more complete. The Cœrians, in Livy, signify to the Romans that the Tarquinians passing through their land with a small force, though they had asked for nothing but a passage, had drawn along with them some of the country people to join them in the marauding practices of which they were accused: that if it were wished that they should be given up, they were ready to give them up; if it were wished that they should be punished, they were ready to punish them.

5 In the second league of the Carthaginians and Romans, which is extant in Polybius, there is this passage (if rightly read): *If not, let each pursue his own right by private proceedings: if this does not succeed, let it be considered a public delict.* Eschines, in his answer to

de pace Græcīe, dixisse inter alia, sēquum esse ut poenas luerent commissorum criminum non civitates, sed qui peccasent: nec quicquam nocendum civitatibus quāe accusatos iudicio sisterent. Quintilianus declamatione CCLV. *Proximos existimo eos transfugis<sup>1</sup> a quibus transfugae recipiuntur.*

p. 480 D. 6 Inter mala quāe ex discordiis civitatum nascuntur et hoc ponit Dion Chrysostomus oratione ad Nicomedenses: ἔστι τοῖς ἀδικήσασι τὴν ἐτέραν πρὸς τὴν ἐτέραν καταφυγεῖν· licet his qui alteram injuria affecerunt ad alteram confugere.

L. ult. D. de legation. 7 Hic de deditis occurrit quæstio, an si a sua civitate dediti, nec recepti sint ab aliis, cives maneant. Non manere censebat Pub. Mūtius Scævola, quia quem populus dedidisset expulisse ex civitate sua videretur, sicut faceret cum aqua et igni interdiceret. <sup>3</sup>Contrariam sententiam defendit Brutus, L. I. c. 40. et 2. c. 32. de Oral. Top. & id post eum Cicero: quāe et verior est, non tamen proprie ob et pro A. Cic. c. 34.

A quibus transfugae recipiuntur] Zonaras Basilio Porphyrogenetto: ἡ πεμψί τρόπος Χοσρόην δξιῶν μὴ παράδεξανθαι τὸν τυραννίσαντα καὶ κατὰ τοῦ οἰκετοῦ δεσπότου γενομένον, ἵνα μὴ καὶ καθ' ἁντοῦ ὑπόδειγμα δοῖ τοὺς δύτας· misit ad Chosroëm postulatum ut dederetur sibi regni affectator, qui domino contraria cepisset arma, neve in semelipsum perniciōsum exemplum sta-

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the accusation of Demosthenes respecting his embassy to Philip, relates that when they discoursed with Philip on the peace of Greece, he said, among other things, that it was just that the punishment of the crimes which were committed should fall, not on the cities, but on the offenders: and that the cities who should bring to judgment the persons accused, ought not to be harmed. (Quintilian says, *Those are next door to deserters who harbour deserters\**.)

6 Among the evils which arise from the discords of states, Dio Chrysostom puts this: *It is possible that those who have injured one city, to fly to another.*

7 There occurs the question, of persons given up, if they are given up by one state, and not accepted by the other, do they remain citizens?

P. M. Scævola held that they did not: since when the people had given up a person, it was as if they had expelled him from the city, as if they had interdicted him from fire and water. Brutus, and after him Cicero, defend the opposite opinion. And this is the sounder opinion; not, however, properly for the reason which Cicero gives, that a surrender, like a donation, cannot be understood without

\* This passage is not quite to the purpose. W.

sine acceptione non possit intelligi. Nam actus donationis perfectionem non habet nisi ex duorum consensu. At dedere, de quo hic agimus, nihil est aliud quam civem alterius populi potestati permettere, ita ut de eo statuat quod voluerit. Hæc autem permissio jus nullum dat aut adimit; executionis tantum impedimentum tollit. Quare si alter populus concessu jure non utatur, erit is qui deditus est eo loco ut a suo populo possit puniri (quod in Clodio Corsis dedito, nec ab iis accepto <sup>Val. Max. vi.</sup>  
<sup>a</sup> evenit) aut non puniri, ut multa sunt delicta in quibus utrumvis fieri potest. Jus autem civitatis, ut et jura et bona alia, non amittitur ipso facto, sed decreto aliquo aut judicio, nisi lex aliqua factum velit haberi pro re judicata, quod hic dici non potest. Hoc denique modo et bona, si dedita nec accepta sint, manebunt cuius fuerant. At si deditio accepta sit, et postea casu aliquo reversus sit is qui fuerat deditus, is civis non erit nisi ex novo beneficio: quo sensu verum est, quod Modestinus de dedito respondit.

L. 4. D. de  
captivis.

tueret Chorœs. [Lib. xvii. cap. 5. ubi agitur de Sciero Magistro Militum.] Vide de piratis Lesbi mendose receptis Chalcocondylam libro x. init.

\* Confer, de hac quæstione, PUFEN-

DORF. *De Jure Nat. et Gent.* Lib. viii. c. 11. § 9. Et de L. ult. D. *De Legat.* quæ diximus in Notis Gallicis ad hunc locum. J. B.

acceptance. For the act of donation is not complete without the consent of two: but the giving up or surrender of which we have spoken is nothing more than leaving a citizen of ours to the power of another people, so that they may determine about him what they will. But this permission does not give or take away any right: it may take away an impediment to the execution of punishment. Therefore if the other people do not use the right which is conceded to it, the person so surrendered will be in a condition to be punished by his own nation, (as happened in the case of Clodius, surrendered to the Corsicans and not accepted by them;) or he may not be punished, as there are many delicts in which the one or the other may take place. And the rights of a citizen, like many other rights and possessions, are not lost by a mere fact, but by some decree or sentence; except there be some law which directs the fact to be considered as a judicial act, which cannot be said in this case. And in the same way, if goods are surrendered but not accepted, they remain whose they were. But if the surrender of a person is accepted, and afterwards he who had been surrendered happens to return, he is no longer a citizen, except by some new concession of citizenship to him: and in this sense the opinion which Modestinus gave respecting a person surrendered, is true.

8 Quæ autem diximus de nocentibus dedendis aut puniendis, non tantum ad eos pertinent qui subditæ semper fuerunt ejus apud quem nunc reperiuntur, verum etiam ad eos qui post crimen commissum aliquo confugerunt.

V. 1 Neque obstant illa adeo prædicta "supplicum jura et asylorum exempla. Hæc enim illis prosunt qui immerito odio laborant, non qui commiserunt quod societati humanæ aut Lib. XIII. nov. c. 22. hominibus aliis sit injuriosum. Gylippus Laco apud Diodorum Siculum agens de illo supplicum jure sic ait: *qui initio jura ista introduxerunt, infelicibus quidem misericordiam, at his qui malo animo injuriam intulerunt, poenam expectandam voluerunt.* Postea: *hi vero si dolo malo, si injusta alieni cupiditate in mala hæc inciderunt, ne accusent fortunam, ne supplicum sibi nomen imponant.* Id enim jure hominum illis debetur "quibus innocens est animus, irata fortuna. Horum vero vita plena factis injustis, nullum ipsis locum reliquit qui ad miserationem et perfugium pateret. Duo illa, fortunam et injuriam, Menander optime distinxit:

*Apud Stob. Tū. 7.*

"Ατύχημα καδίκημα διαφορὰν ἔχει:

Tὸ γὰρ δὲ τύχην γίγνεται, τὸ δὲ αἰρέσει.

\* *Supplicum jura]* Κοινοὶ ἱκεσίας νόμοι Polybio, et Malcho in *excerptis legationum*. [Hic dicit: μή μέν τοι δῖσιν Γόττοις, ὥσπερ οὐδὲ ἀλλοις ἀνθρώποις, ικέταις, καὶ σωτηρίας δεομένους ἀνθρώπους, τοῖς λαβεῖν βουλομένοις ἐκδιδόνται προχείρως. Pag. 69. Ed. Hæschel.]

\* *Quibus innocens est animus, irata fortuna]* Oraculum vetus [apud Elia- num, Var. Hist. III. 44.]

"Ἐκτενεῖς τὸν ἑταῖρον ἀμύνεσθε οὐ σ' ἡμίλαντος. πέλεις δὲ χάρας καθαράτερος η πάρος ήσθα.

Carum occidisti, dum vis succurrere: nullum Crimen habes: manus est tibi purior ac fuit ante.

\* *Ατύχημα καὶ δίκημα*] Philo de Jūdice: ἐλεος ἐπ' ἀτυχήμασιν ὁ δὲ ἐκουσίᾳ γνώμῃ πουνηρεύμενος, οὐκ ἀτυχῆς δλλ' δίκος: misericordia infortunii debetur; at qui deliberaata sententia male agit, non infelix est, sed injustus. (Pag. 722 A.) Sic M. Antoninus mentem vult inspicere: Ινα ἐπιστήσης πότερον ἀγροις η γνώμη, καὶ ἅμα λογοτροφοῖς, τι συγγενεῖς: ut noris ignorantia in aliquo an consilium fuerit, et simul ea

8 What we have said of surrendering or punishing criminals, applies not only to those who have always been the subjects of him under whose rule they are now found; but also to those, who, after committing a crime, have fled to any place.

V. 1 Nor is this doctrine impeached by the rights of suppliants, and the cases of asylum, which are so much spoken of. These arrangements are for the advantage of those who are persecuted without deserving to be so; not of those who have committed what is injurious to human society or to other men. So Gylippus says of this right of suppliants. [See.] Menander very properly distinguishes

Injuria illud distat infortunio,  
Hoc casus, illam quod voluntas efficit.

Non abit hinc Demosthenis dictum : δίκαιον ἔστιν ἐλεεῖν οὐ τοὺς ἀδίκους τῶν ἀνθρώπων, ἀλλὰ τοὺς παρὰ λόγου δυστυχοῦντας. Quod Cicero ita verit de inventione secundo : *miseriis* <sup>In Aphob. 1.  
sub fin. p.  
586 A.</sup> *reri oportet, qui propter fortunam, non propter malitiam,* <sup>Cap. 38.</sup> *in miseriis sunt.* Et <sup>Deut. xix. 1.  
et seqq.</sup> Antiphonis illud : τὸ ἀκούσιον ἀμάρτημα τῆς τύχης ἔστι, τὸ δὲ ἐκούσιον τῆς γνώμης quod non sponte fit, fortunæ est; quod sponte, consilii. Et hoc Lysiae : <sup>Orat. xxv. 3.</sup> οὐδὲν οὐδὲν ἐκούσιον δυστύχημα γίνεται nemini infortunium sponte sua accidit. Sic in sapientissima lege, quibus telum manu fugisset, quo imperfectus esset homo, asyla patebant: servis quoque perfugium dabatur: at qui deliberato hominem innocentem occidissent, qui civitatis turbassent statum, his ne ipsum sanctissimum Dei altare patrocinabatur. Hanc legem Philo explicans ait, ἀσυλίαν αἰνέροις τὸ ιερὸν μὴ παρέχεσθαι profanis in fano nullum esse receptum. Nec aliter Graeci antiquiores. Nauplium narrantur Chalcidenses Achivis <sup>Plut. quest. gr. 32.</sup> dedere noluisse, sed causa additur, quia satis se purgaverat de his quæ ab Achivis objiciebantur.

*consideres qua his coherent. Sic τὰ δέ  
ἀγνοίας η̄ λιθη̄ς, qua ab ignorantia aut  
oblivione veniunt, et τὰ ἐκ προνοίας,  
qua ex consulo fiunt, distinguunt Totila apud Procopium Gotthicorum III. cap. 9. [In loco Marci Antonini, qui legitur Lib. ix. § 22. Edit. Gataker. verba ultima male vertit Auctor, quæ significant, ut Interpres ille eruditissimus reddit: cogitesque simul esse tibi cognatum, i. e. natura. J. B.]*

\* Non Antiphania, ut habent omnes Editiones, sed ANTIPHONTIS, Orat. XIV. xv. pag. 134. [p. 140, 21]. Nomen

idem eodem modo corruptum infra legitur, § 16. Locus autem mox sequens Lysiae, exstat Orat. xxx. seu contra Philon. cap. iii. pag. 473 [p. 187. 39]. J. B.

\* *Dedere noluisse*] Recepit nec dedidit Pipinus ex Neustria ob tyrannidem ad se confugientes. Est id apud Fredogarium in rebus Pipini ad annum 1000 lxxxviii. Etiam ab ecclesia Romana ad se confugientes recepit Ludovicus Pius Imperator, ut apparet ex ejus decreto facto anno 1000 CCCXVII. inserto in tomum II. conciliorum Gallie: et Carolus Calvus, qui ex parte fratri sui

misdeed from misfortune; the former, he says, happens by will, the latter by chance. So Demosthenes, and Cicero after him, say that the proper objects of pity are those who are in distress through fortune, not through malice. And so that of Antiphon\*, and that of Lysias. [See.] So in the Hebrew law, he who had killed a man by chance, might take to the city of refuge: but they who had deliberately killed an innocent man, or disturbed the state of the city, were not to be protected, even by the altar of God. So Philo. And the more ancient Greeks had the

\* Orat. XIV. xv. p. 134. Ed. Wech. not Antiphanes. J. B.

2 Erat apud Athenienses Ara Misericordiæ, cuius meminerunt <sup>5</sup>Cicero, Pausanias, <sup>6</sup>Servius, etiam Theophilus in Institutionibus, et quam late describit Papinius duodecimo *Thebaidos*. At quibus patebat illa? Audi poëtam (vers. 483):

Et miseri fecore sacram:

mox convenisse eo ait (vers. 507):

Victos bellis patriaque a sede fugatos,  
Regnorumque inopes.

*Panaeth. p. 107 s. Tom. I.* Aristides <sup>b</sup>propriam Atheniensium laudem esse ait, *τὴν τῶν πανταχόθεν δυστυχούντων ὑποδοχὴν καὶ παραμιθίαν, quod omnibus undique infelicitibus perfugio ac solatio esset.* Et alibi: *τοῖς καθ' ἐκάστους ἀτυχοῦσι κοινὴ πᾶσιν ὑπεστιν εὐτυχία, τὸ τῆς πόλεως ταύτης ήθος ὑφ' οὐ σωζονται· his qui ubivis locorum infelices sunt, communis eis una est felicitas, bonitas civitatis Atheniensis, per quam salutis compotes fiunt.* Apud Xenophontem Patrocles Phliasius in oratione quam Athenis habebat: *ἔχόλουν τήνδε τὴν πόλιν, ὅτι πάντας καὶ τοὺς ἀδικουμένους καὶ τοὺς φιβουμένους ἐνθάδε καταφεύγοντας ἐπικουρίας δεομένους ἡκουον τυγχάνειν laudabam hanc urbem, quod omnes aut injuria affectos, aut sibi præmetuentes, si huc perfugissent, auxiliū compotes fieri intellexeram.* Idem sensus est in epistola Demosthenis pro Lycurgi liberis. Itaque OEdipus ad Colonum confugiens, in ejus nominis tragœdia, <sup>c</sup>apud Sophoclem ita testatur (vers. 521, etc.):

Ludovici ad so profuger: Aymonius  
Lih. v. cap. 34. De Cegena Patzinaca  
non dedito postulanti Tyracho vide in  
Constantini Monomachi rebus Zonaram,  
(Lib. xvii. cap. 26. Ed. Reg.) Sic et  
Osmanes ab Inungino præfecto non  
deditus Eskisari: Leunclavius libro ii.  
*Historia Turcica.* Albuquericum Lu-  
stani non dedidere, ut memorat Mari-

ana xvi. 18.

<sup>b</sup> Apud Scholiastem Statii, in Theb. xii. 481. ubi quasi ex Libro Tusculanorum id refert. Sed nil de ea Ara ibi reperitur. J. B.

<sup>c</sup> Servius] Ad viii. *Aeneidos*, (vers. 342.)

<sup>d</sup> Propriam Atheniensium laudem] Quam Arragonis tribuit Mariana xx. 13.

same rule. The Chalcidians would not give up Nauplius to the Achaians; but the cause is added, because he had sufficiently cleared himself from the accusations of the Achaians.

2 There was at Athens an Altar of Mercy, mentioned by Cicero\*, Pausanias, Sorvius, Theophilus, and described at length by Statius in his *Thebaid*. But to whom was it accessible? The poet says, *The miserable made it sacred*: and adds, that *those who came together there*,

\* Quoted by the Scholiast on Statius, *Theb.* xii. 481, where he refers it to the Tusculans: but in that work there is nothing about such an altar. J. B.

Heu, Cecropidæ, mala multa tuli:  
Sed nempe tuli: Deus est testis,  
Nihil horum sponte patratum.

Respondet Theseus (vers. 565, et seq.):

Non me pigebat hospitem, qualem, Cœdipe,  
Te tueor, omni sospitare in tempore,  
Homo esse memini.

Similiter Thesei filius Demophon, <sup>6</sup>cum Herculis posteri Athenas configissent, sic ait:

Hæc patria nostra semper invalidos solet,  
Sed jure fretos, ope sua defendere.  
Antehac amicis mille relevandis tulit  
Discrimina: et nunc aliud in promtu imminet.

Et hoc illud factum est, ob quod Athenienses præcipue prædicabat Callisthenes: *τούτους γὰρ καὶ πρὸς Εὐρυσθέα πολεμῆσαι ὑπὲρ τῶν παιῶν τοῦ Ἡρακλέους τυραννοῦντα ἐν τῷ τότε τῆς Ἑλλάδος· hos enim et in Eurysthea bellum suscepisse <sup>d</sup>pro Herculis liberis, cum Græciam Eurystheus tyrannide premeret.*

3 Contra de maleficiis hoc habes in eadem tragœdia:

Hunc qui facinorum conscient, nec legibus  
Fidens ad aras volvitur supplex Dcūm,  
Trahere ad tribunal nulla religio mihi:  
Mala semper æquum ferre qui fecit male.

Gepidæ perire omnes malunt quam Il-  
digisalem Romanis aut Longobardis de-  
dere. Procopius Gotthicorum iv. (Hist.  
Miscell. cap. 27.)

<sup>e</sup> Apud Sophoclem] Vide totum locum; est enim lectu dignus.

<sup>f</sup> Non Demophon, sed Chorus apud EURIPIDEM Heracleid. vers. 330, et seqq. Versus autem, qui mox num. 3. sequuntur, et quasi ex eadem tragœdia

adducuntur, sunt ex incerta Tragœdia Euripidis, apud Stobæum, Germ. XLIV. Tit. 46, [p. 304]. Ed. Autoris nostri, qui inde versionem suam hue transtulit. Incipiunt Græci versus ita: 'Εγὼ γὰρ στριψ μη δίκαιος ὁν δνίρ, etc. J. B.

<sup>g</sup> Pro Herculis liberis] Vide Euripidem Heracleidis, et Apollodorum (Bibl. L. II. c. 8. § 1.)

were those conquered in war, those driven from their country, those who had no state to which they belonged. So Aristides, in praise of the Athenians, says that Athens was the refuge for the wretched. In Xenophon, Patrocles the Phliarian says the same. So Demosthenes; and Sophocles in the *Cœdipus Coloneus*; and Demophon, [rather the Chorus, in Euripid. *Heracleid.* v. 330, &c. J. B.] And this is the point for which Callisthenes especially praised the Athenians.

3 On the other hand, in the same tragedy\*, one of the characters

\* Not the same, but an uncertain tragedy of Euripides in Stobæus: Germ. XIV. Tit. 46. J. B.

Idem *Ione* (vers. 1315, et seqq.):

Non enim tangi decet  
Manu nocente numina, at justum fuit  
Piis patere templa contra injurias.

*Adver. Leocr.* Narrat orator Lycurgus Callistratum quendam, qui capital  
P. 156. commiserat, consulto oraculo responsum accepisse, si Athenas  
[(p. 150.)] iisset, τενέσθαι τῶν νόμων, consecuturum quod jus esset: ilum vero confugisse ad id quod Athenis sanctissimum esset altare, impunitatis fiducia: at nihilominus occisum eum ab observantissima suarum religionum civitate, atque ita impletam oraculi fidem. Et Tacitus improbat receptum suo saeculo morem, per Graecas urbes flagitia hominum ut ceremonias Deum protegendi. Apud eundem est: *principes quidem instar Deorum esse: sed neque a Diis nisi justas supplicum preces audiri.*

*Ann. III. 60.*

*Ibid. c. 36.*

4 Tales ergo aut puniendi, aut dedendi, aut certe amo-

\* *Ad id quod Athenis sanctissimum esset altare]* In Lusitania Ferdinandum cubiculi praefectum e templo ad quod confugerat raptum, et igne combustum, ob vitium nobili virgini illatum, narrat Mariana libro xxii. Vide et de asylis librum viri magni Pauli Veneti, societas servorum quae dicitur.

<sup>7</sup> Non erat Persa, sed Lydus. Inspice locum Herodoti, in margine a me distincte indicatum. J. B.

<sup>1</sup> *Perseus rex Macedonum]* Narrat et Appianus excerpto legationum num. 20. Simile illud in latina vita Themistoclis. [Corn. Nepos: c. 8], cum ab Atheniensibus et Lacedemoniis exporsetur publice, supplicem non prodidit (Admetus rex Molosorum) monuitque ut consuleret sibi: itaque Pydnam cum deduci jussit, et quod satis esset presidii dedit. Sic et Ildigim Langobardum dimittunt Gepidae apud Procopium

says that he knows no piety which withholds him from dragging guilty men from the altar to the tribunal. And the same author, in the *Ion*, says, that guilty men should not go to the gods for refuge, but that the temples should be open to the pious to protect them from injury. Lycurgus the orator relates that a certain Callistratus, who had committed a capital offense, having consulted the oracle, received for answer that if he went to Athens, *he would have the benefit of the law*: that accordingly, he took refuge at the most sacred altar at Athens, depending upon impunity; but that he was nevertheless put to death by the city, strictly careful of its religious observances; and thus the oracle was fulfilled. Tacitus blames the custom which was in his time prevalent, of protecting, in the Greek cities, the crimes of men as the ceremonies of the gods. The same writer says, that *Princes are indeed like gods; but that even the gods hear only the just prayers of suppliants.*

4 Such persons, therefore, are either to be punished, or surrendered, or at least, removed. So the Cymeneans, not being willing either

vendi. Sic narrante Herodoto Cymæi Pactyen <sup>7</sup>Persam Lib. I. 60, 61. cum nec dedere vellent, nec retinere auderent, permiserunt abire Mitylenen. Demetrium Pharium qui bello victus ad <sup>Liv. xxii. 33.</sup> Philippum Macedonum regem fugerat, a rege depoposcerunt Romanii. <sup>1</sup>Perseus rex Macedonum, in purgatione ad Martium, de his agens qui Eumeni insidiati dicebantur: *ego istos, ut primum in Macedonia esse admonitus a vobis compéri, requisitos abire ex regno jussi, et in perpetuum interdixi finibus meis.* Samothraces Euandro qui Eumeni insidias struxerat, denuntiant, liberaret religione templum. <sup>Liv. xlii. 41.</sup> <sup>Liv. xlvi. 5.</sup>

5 Ceterum jus hoc, quod diximus, descendit ad poenas eos qui extra territorium profugerunt, hoc et proxime actis sæculis et plerisque Europæ partibus, circa ea demum crimina usurpatum quæ statum publicum tangunt, aut quæ eximiam habent facinoris atrocitatem. Minora mutua dissimulatione transmitti invaluit, <sup>8</sup>nisi federis legibus propriis quiddam con-

*Gotthicorum III. (cap. 35.)* Adde epistola Theuderici ad Trasamundum regem Vandalorum de Giselico suscepto, [apud Cassiodor.] v. 43 et 44. Et ea que in vita regis Ludovici. Sic Christophorum Sborovium a se amovit Imperator Rudolphus II. teste Thuano Lib. LXXXIII. in anno c<sup>1</sup>o I<sup>o</sup> LXXXV. Elisabetha Scotis respondet se Bothwellum aut reddituram aut ex Anglia exterminaturam. Camdenus id habet

circa ann. c<sup>1</sup>o I<sup>o</sup> xciii. (pag. 607.) De Alfonso Gegionis comite a rege Gallie damnato, ac negato ei in Hispaniam receptu, vide Marianam xix. 6.

<sup>8</sup> *Nisi federis legibus propriis quiddam contenerit]* Ut in federe Helvetiorum cum Mediolanensibus Simlerus recitat. Federa Anglorum cum Gallis dedi rebelles et profugos volunt, cum Burgundis expelli. Camdenus in anno c<sup>1</sup>o I<sup>o</sup> c. (pag. 758.)

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to give up Pactyas the Persian, or to retain him, allowed him to go to Mitylene. Demetrius of Pharsos, who, when defeated, had fled to Philip, king of Macedon, the Romans demanded from the king. Perseus, king of Macedon, in defending himself to Martius, and speaking of those who were said to have laid wait for Eumenes, said that he had commanded them to depart from his kingdom, and never to return. The Samothracians denounced to Evander, who had practised secretly against Eumenes, the necessity of freeing their temples from pollution.

5 But this right of demanding, for the sake of punishing, those who have fled out of the territory, is, in this and the last preceding ages, in most parts of Europe, used only with regard to those crimes which affect the public good, or have some peculiar features of atrocity. It has become the custom to overlook on both sides smaller offenses, except there be a treaty with some especial provisions on this subject. It is to be remarked, however, that robbers and pirates who have made themselves strong and formidable, may be received and

venerit. Sed et hoc sciendum est, latrones ac piratas qui ita invaluerunt ut formidabiles se fecerint, recte recipi ac defendi, poenam quod attinet, quia interest humani generis ut si aliter non possunt impunitatis fiducia a maleficiis revocentur, ejusque negotium gerere quivis populus aut populi rector potest.

VI. 1 Notandum et hoc, interim dum de cause justitia cognoscitur, defendi supplices. Sic Demophon ad legatum Eurystheos :

*Eurip. Herac.  
v. 222.*

Si crimen istis aliquod hospitibus struis,  
Jus impetrabis: vi quidem hinc non abstrahes.

Et in altera tragœdia Theseus ad Creontem :

Es facinus ausus <sup>8</sup> temet indignum, Creo,  
Tuisque Thebis ac tuis majoribus:  
Ingressus urbem que colit fas ac pium,  
Que cuncta rite legis ex norma facit,  
Nostris omissis moribus, quicquid lubet  
Moliris, et vi cuncta te acturum putas.  
Adeone hominibus vidua vel patiens jugi  
Urbs ista visa est, et ego nullius rei?  
Non te ista docuit civitas Amphionis,  
Quippe educare haud solita mortales feros:  
Nec approbabit illa cum te audiverit  
Quæ sunt Deorum, quæque mea pervadere,  
Et rapere ab alma sede miseros supplices  
Ego Labdacea si urbe posuisset pedem,  
Quamvis fuissent justa mihi certissima,  
Indubia, nulli injicere tentassem manum,  
Nisi annuento qui soli regnum tenet,

<sup>8</sup> Est in Graeco ἐμοῦ, apud SOPHOCLEM, *Œdip. Colon.* vers. 904 [v. 911 *Ed. Dindorf.*] In *Excerptis ex Trag.* *et Comed. Græc.* habet etiam *te*, nescio quo fato, quum ibi recte scriperit ἐμοῦ, pag. 98, 99. *J.B.*

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defended [on condition of desisting from their evil practices, G.] so far as punishment goes; because it is the interest of the human race, that if they cannot be reformed in any other way, they may be so by the assurance of impunity for the past; and any people or any ruler may negotiate such a matter.

VI. 1 It is to be remarked that it sometimes happens that suppliants are defended [provisorily], till their case can be fairly judged. So Demophon says to the messenger of Eurystheus, that if he has any charge against the refugees, he will obtain justice, but that till then, they will not be given up. And in another tragedy [the *Œdipus Coloneus* of Sophocles, v. 904]. Theseus says to Creon that it is against the practice of Athens to give up refugees. Your attempt, he says,

Quid in urbe deceat hospitem externa memor.  
 Tu nec merentem patriam aspergis tuam  
 Probro atque mæculis, et senem certe tua  
 Te fecit ætas, sed parum mentis potem.

2 Quod si id, cuius accusantur supplices, non sit vetitum jure naturæ aut gentium, res dijudicanda erit ex jure civili populi unde veniunt: quod optime ostendit *Æschylus Suppli-cibus*, ubi rex Argivus Danaidum gregem ex *Ægypto* venientem sic affatur:

*Εἴ τοι κρατοῦσι πάides Αἰγύπτου σέθεν,  
 Νόμῳ πολεως φάσκοντες ἐγγύτατα γένους  
 Εἶναι, τίς ἀν τοῦσδε ἀντιωθῆναι θέλοι;  
 Δεῖ τοι σε φεύγειν κατὰ νόμους τοὺς οἰκοθεν;  
 'Ως οὐκ ἔχουσι κύρος οὐδὲν ἀμφὶ σοῦ.*

Manum tibi si immittat *Ægypti* genus,  
 Quod lege patria proximos se sanguine  
 Dicant, quis hec objicere se contra volit?  
 Quare tuum est docere natalis soli  
*Ex lege*, nullo jure te illis subjici.

VII. 1 Vidimus quomodo a subditis, aut veteribus aut advenis, culpa in rectores transeat: vicissim a summa potestate in subditos culpa transibit, si in crimen subditi consenserint, aut si quid fecerint summæ potestatis imperio aut suasu, quod facere sine facinore non poterant: qua de re rectius erit infra agere, ubi, quæ partes sint subditorum, examinabitur. Etiam inter universos et singulos communicatur delictum, quia, ut Augustinus ait loco supra adducto, *ubi universi, ibi et singuli; universi non possunt nisi ex singulis quibus-* *In Lævit. Quæst. 20.*

is an act unworthy of Thebes and of you\*.

2 And then, if that of which the refugees are accused is not a matter against the law of nature or of nations, it must be judged by the civil law of the people from whom they come; as *Æschylus* assumes in his *Suppliants*, where Danaus addresses the persons who came from Egypt to that effect.

VII. 1 We have seen how the fault passes to the rulers from the subjects, either ancient or recently arrived; in like manner the fault will pass from the rulers to the subjects, if these have consented to the crime, or if they have done anything by the command or the suasion of their superiors, which they could not do without guilt: on which point it will be more correct to treat hereafter, when we have to

\* In the Greek, *ἐμοῦ*, but Grotius translates it *te*, both here and in his extracts from the Greek Tragedies and Comedies. J. B.

*que constare: nam singuli quique congregati, vel in summam reputati, faciunt universos.*

2 Pertinet autem culpa ad singulos qui consenserunt, non ad eos qui aliorum sententiis victi sunt. Distinctæ enim sunt pœnae singulorum et universitatis. Sicut singulorum poena interdum est mors, ita πόλεως θάνατος ἀνάστατος γενέσθαι, mors civitatis reverti: quod fit cum corpus civile dissolvitur; qua de re diximus alibi. Atque hoc modo si civitas esse desinat, usumfructum velut morte finiri recte dixit Modestinus. Singuli in servitutem pœnæ nomine rediguntur, ut Thebani sub Alexandro Macedone: exceptis his qui decreto exuendæ societatis contradixerant. Sic et civitas subit servitutem civilem in provinciam redacta. Singuli bona sua amittunt confiscazione. Sic civitati adimi solent quæ habet communia, muri, navalia, naves bellicæ, arma, elephanti, ærarium, agri publici.

3 At ut singuli ob delictum universitatis citra consensum suum ea amittant, quæ ipsorum sunt propria, injustum est, ut recte ostendit Libanius in ea quæ est de seditione Antiochena.

<sup>b</sup> *Theodosii probat factum]* Eadem quæ Libanius de hac re dicit et Chrysostomus in xvii. de Statuis: in eodem

Antiochenos paria olim constituerat Marcus Antoninus philosophus, ut testis est Capitolinus (cap. 25) et in By-

speak of the duties of subjects. There is even a participation of punishment by communication between the general body and individuals; for, as Augustine says, *The general body consists of individuals, &c.*

2 But the fault lies at the door of the individuals who have consented to the act, not to those who were outvoted by the others. For the punishments of individuals and of the general body are different. As the punishment of individuals is sometimes death, so it is the punishment of a city to be destroyed, which is done when the civil body is dissolved; of which case we have spoken elsewhere. And if a city or state cease to exist in this manner, Modestinus rightly said, that the life-interest which any persons have in it ceases. Individuals are reduced to slavery in the way of punishment, as the Thebans under Alexander of Macedon: excepting those who had voted against the proposal of making the alliance [with the Macedonians, G.] So also a city or state undergoes civil slavery, by being reduced into the condition of a province. Individuals lose their goods by confiscation. But [in punishing a city] the things which are taken from the city are the public property; as walls, arsenals, fleets, arms, elephants, its treasury, and its public lands.

3 But that individuals should lose what is their own property, on

Lycor. orat.  
p. 130.

Supra e. 9,  
§ 4.

L. 21. D.  
quib. mod.  
neus/r. am.  
Plut. Alex.  
670 v.

Idem <sup>b</sup>Theodosii probat factum, qui commune delictum punierat interdictione theatri, balneorum, nominis metropolitani.

VIII. 1 Egregia hic occurrit quæstio, an pœna ob delictum universitatis semper exigi possit. Quamdiu durat universitas, videtur posse, quia idem corpus manet, quanquam particulis succendentibus, ut alibi ostensum est. Sed ex adverso notandum est, quædam de universitate dici primo ac per se, ut habere ærarium, leges, et similia: quædam non nisi derivatione a singulis. Sic namque doctam dicimus universitatem et fortē, quæ plurimos habet tales. De hoc genere est meritum: primo enim convenit singulis, ut animum habentibus quem universitas per se non habet. Extinctis ergo illis per quod ad universitatem meritum deducebatur, ipsum quoque meritum extinguitur, ac proinde et pœna debitur, quod sine merito diximus non consistere. Libanius in dicta oratione: ἐμοὶ μὲν γὰρ δοκεῖ ἀρκεῖν ἡγούμενος τὸ μηκέτ' εἶναι μηδένα τῶν ταῦτ' ἡδικηκότων· ita enim ex-

zantinos Seyerus, demto theatro, ther-

Herodianum (Lib. III. c. 6. n. 19. Edit. Bæcler.) Zonaram, (Lib. XII. cap. 8) et quæ supra dicta a nobis.

account of a delict of the general body, committed without their consent, is unjust: as Libanius rightly shews on the sedition of Antioch. The same writer approves an act of Theodosius, who punished a public offense by interdicting the theatre, the public baths, and the title of *metropolis*.

VIII. 1 This important question occurs, whether punishment may always be exacted for the delicts of the general body. So long as the constitution of the body continues, it would seem that it can, because the same body remains, though preserved by a succession of different particles, as we have elsewhere shewn. But, on the contrary side, it is to be observed that some things are asserted of the body primarily and *per se*, as to have a treasury, laws, and the like; others only derivatively from its members. Thus we call a body learned and brave, which has many learned and brave members. And desert [of punishment, G.] is of this kind; for, in the first place, it belongs to individuals, as having a spirit and intelligence which the body by itself has not. Therefore if these persons be extinct, from whom desert was deduced and carried to the account of the body, the desert is extinct, and also the desert of punishment; which, as we have said, cannot exist without desert. So Libanius says: *It must suffice you as to punishment, that no one is left of those who offended.*

*istimo, sufficere tibi, ad pœnam quod nemo supersit eorum qui deliquerunt.*

2 Probanda igitur Arriani sententia damnantis vindictam <sup>9<sup>i</sup> Alexandri in Persas, cum pridem interiissent qui in Græcos peccaverant. De excidio Branchidarum facto per eundem Alexandrum hoc est Curtii judicium : *Quæ si in ipeos proditionis auctores excogitata essent, justa ultio esse, non crudelitas, videretur. Nunc culpam majorum posteri luere, qui ne viderant quidem Miletum, adeo Xerxi non potuerant prodere.* Simile est alio loco Arriani judicium de Persepoli incensa, in ultionem eorum quæ Athenis Persæ fecerant : ἀλλ' οὐδὲ ἐμοὶ δοκεῖ σὺν νῷ δράσαι τοῦτό γε Ἀλέξανδρον, οὐδὲ εἶναι τις αὕτη Περσῶν τῶν πάλαι τιμωρία· at mihi non videtur hoc prudenter fecisse Alexander, neque vero hæc vera est vindicta in eos Persas qui pridem esse desierant.</sup>

3 Nam Agathoclis illud nemo non ridet, qui ad Ithacen-

\* Non damnat hanc vindictam Arrianus, Lib. ii. cap. 14. ubi inducit Alexandrum veteres illas injurias Persarum memorantem. Ex memorie vitio confudit Auctor Arriani judicium de Persepoli incensa, quod paullo post subjecit, et a prima Editione aberat. J. B.

<sup>1</sup> *Alexandri in Persas]* Propterea aliam ei bello causam attribuit Julianus in Constantii laudatione : καὶ ὅτι μὲν οὐδεὶς τῷ πόλεμῳ συνέστη πρότερον,

οὐδὲ ἔτι Τροίαν τοῖς "Ελλησιν, οὐδὲ ἔτι τὸν Πέρσας Μακεδούς, οὔπερ δὴ δοκούσιν δίκῃ γενέσθαι, τοσαῦτην ἔχων ὑπόθεσιν καὶ παῖδι του δῆλου. οὐ τῆς μένγες λίαν ἀρχαίων ἀδικημάτων τιμωρίας σφόδρα νεωτέρας, οὐτ' εἰς πεῖδας οὐτ' εἰς ἐγκύόνους γενορέντας, δλλ' εἰς τὸν διφλόμενον καὶ ἀποστερίσαντα τὴν ἀρχὴν τούς τῶν ἐδοκησάντων (male legitur ἀδικησάντων) στογόνους μὲν τηναντι bellum, quod quidem justum cen-

2 We must therefore approve the opinion of Arrian, when he condemns \* the revenge of Alexander upon the Persians, since those who had wronged the Greeks were long ago dead. Concerning the destruction of the Branchidae by the same Alexander, the judgment of Curtius is similar, *that it was not justice, but cruelty, to punish those who could not betray Xerxes, and had never seen Miletus.* And of the same kind is the judgment of Arrian respecting the burning of Persepolis, that there was no true punishment in it, since the offending Persians had long ceased to be.

3 Every one sees the absurdity of Agathocles' answer to the complaints of the Ithacans, of damage done by the Sicilians; that the Sicilians had received more damage from Ulysses. And Plutarch, in his book against Herodotus, says, that it is very unlikely that the Corinthians

\* Arrian, Lib. ii. c. 14, does not condemn this plea of Alexander: the author was thinking of Arrian's judgment on the burning of Persepolis, which occurs immediately after in the text, but was not mentioned in the first edition. J. B.

sium querelas de damnis illatis respondit, plus mali Siculos ab Ulyxe olim pertulisse. Et Plutarchus libro contra Herodotum, minime ait vero esse simile, Corinthios ulcisci voluisse <sup>Pag. 300.</sup> acceptam a Samiis injuriam μετὰ τρεῖς γενεᾶς, post tres hominum ætates. Nec procedit hujus et similium factorum defensio, quam apud Plutarchum legere est *De sera numinis vindicta*. Aliud enim est jus Dei, aliud hominum, ut mox apertius fiet. Neque si æquum est posteros honores et præmia accipere ob merita majorum, ideo et puniri eos ob eorum peccata æquum est. Beneficii enim talis est materia, ut in quemvis conferri sine injuria possit; pœna non item.

IX. Diximus de modis per quos communitas pœnas accedit ex culpæ communitate. Restat spectemus an et, culpa non communicata, communicetur pœna: quæ res ut recte intelligatur, et ne, quæ re ipsa diversa sunt, ob vocum similitudinem confundantur, monenda sunt quædam.

X. 1 Primum, aliud esse damnum directe datum, aliud

*seretur, tali ex causa gestum, non a Græcis in Trajanos, non a Macedonibus in Persas, vel puerो liqueat: non enim illi obsita vetustate crimina seris penis, ne in nepotes quidem aut liberos, persequebantur, sed illos impetebant, qui virorum bene meritorum posteris rim interferebant, regna extorquent. [Locus est, pag. 95 b. Edit. Illustris Spanhemii: sed vertendum erat in posterioribus verbis: Non enim ille (scilicet Con-*

*stantius) obsita vetustate crimina seris pœnis, etiam in filios aut nepotes, persequebatur; verum eum impetebat (i. e. Magnentium) qui posteris virorum bene meritorum Imperium vi cripuerat. Unde patet, Julianum laudi tribuere Constantio, quod non imitatus sit veteres Græcos, aut Alexandrum: adeoque non aliam bello Alexandri in Persas causam adtribuere, sed potius allam non fuisse innuere. J. B.]*

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should have wished to avenge an injury received from the Samians after three generations. Nor is the defense of such cases satisfactory, which we find in Plutarch *On the delayed punishments of the gods*. For the justice administered by God is one thing, that by men, another, as we shall shew hereafter. Nor again can we argue that, because descendants receive honours and rewards for the merit of their ancestors, therefore it is just that they should be punished for their crimes. For benefits are of such nature, by their matter, that they may be bestowed upon any without injury, but punishments are not.

IX. We have spoken of the ways in which a participation in the punishment takes place in consequence of a participation in the crime. It remains that we consider whether, when there is not a participation in the offense, there may be in the punishment; and here, that we may not be misled by the similarity of words when the things are different, we must make a few remarks.

X. 1 First, that a damage directly caused is one thing, and

quod in consequentiam venit. Directe datum voco, quo cuiquam aufertur ad quod jus proprium habet. Per consequentiam, quo sit, ut quis non habeat quod habiturus alioqui fuisset, cessante scilicet conditione, sine qua jus non habebat.

*L. 24. §. 7. d.  
dum. inf.* Exemplum est apud Ulpianum: si in meo puteum aperui quo factum est ut venæ ad te perventuræ præciderentur: negat operis mei vitio damnum datum in ea re, in qua jure meo usus sum.

*L. 26. d. L.* Et alibi, multum ait interesse, utrum damnum quis faciat, an lucro quod adhuc faciebat uti prohibeatur. Et

*L. 63. D. ad  
L. Falc.  
princ.* Paulus jurisconsultus, *præpostorum esse* ait, *ante nos locupletes dici quam acquisierimus.*

2 Sic parentum bonis confiscatis sentiunt quidem incommodum liberi, sed proprie ea poena non est, quia bona illa illorum futura non erant, nisi a parentibus ad ultimum spiritum essent conservata. Quod recte ab Alpheno notatum est,

*L. 3. D. de  
interdict. et  
releg.* cum ait patris poena amittere liberos id quod ab ipso pervenitum esset ad eos: quæ vero non a patre, sed a rerum natura aut aliunde tribuerentur, ea manere incolumia. Sic

*Epist. ad  
Brut. L. 11.  
Ep. 12 et 15.* Themistoclis liberos eguisse scribit Cicero, nec iniquum putat, ut eandem calamitatem ferant liberi Lepidi. Idque ait anti-

a damage caused by consequence, another. I call that a damage directly caused, by which any one is deprived of a proper right which he has; a damage by consequence, that by which any one has not that which he would have had: namely, by the cessation of the condition, without which his right cannot subsist. We have an example in Ulpian: If in my ground I have opened a well, by which the springs which would have come to you are cut off: he denies that, by the effect of my operations, a wrongful damage is done to you, since I was using my own right in my own property. And in another place, he says it makes a great difference, whether any one suffer a loss, or be prevented in a gain which he was going on to enjoy. And so Paulus says, that it is preposterous that we should be supposed to have possessions before we have acquired them.

2 So when the goods of the parents are confiscated, the children feel the loss; but that is not properly a punishment, because those goods were not to become theirs, except their parents kept possession of them till their last breath. Which is rightly noted by Alphenus, when he says that by the punishment of the parent, the children lose that which from him would have come to them; but that which was given them by the nature of things, or from any other source, they do not lose. So Cicero says, that the children of Themistocles were in absolute want, and he does not think it unjust that the children of

quum esse et omnium civitatum; cui tamen mori leges posteriores Romanæ multum temperamenti adjecerunt. Sic cum ex delicto majoris partis, quæ, ut alibi diximus, personam universitatis sustinet, universitas in culpa est, eoque nomine amittit ea quæ diximus, libertatem civilem, muros, et alia commoda, sentiunt damnum et singuli innocentes; sed ea in re, quæ ad ipsos non pertinebat nisi per universitatem.

XI. 1 Præterea notandum, interdum imponi alicui aliquid mali, aut boni aliquid auferri, occasione quidem alicujus peccati alieni, sed non ita ut id peccatum causa sit proxima ejus actionis, quod jus ipsum agendi attinet. Sic qui occasione alieni debiti aliquid promisit, malum patitur, <sup>L. 7. D. de bon. damn. ubi vid. Int.</sup> ex veteri verbo, ἔγγύα, παρὰ δὲ ἀτα sponde, noxa praesto est: at proxima causa obligationis est ipsa promissio. Nam ut qui pro emtore fidejussit, non proprio ex emto tenetur, sed ex promisso: ita et qui pro delinquentे, non ex delicto, sed ex sua sponsione. Atque hinc fit quod malum illi ferendum mensuram accipit non ex delicto alterius, sed ex potestate quam ipse in promittendo habuit.

2 Cui consequens est, ut ex sententia, quam veriorem

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Lepidus should bear the same lot. And this, he says, was the ancient custom, and common to all cities; though this custom was much limited and tempered by the later laws of Rome. So when by the delict of the general body, which, as we have said, stands for the whole body, the whole body is in fault, and on that ground loses, as we have said, civil liberty, city walls, and other advantages, innocent individuals also feel the inconveniences; but they feel it in those things which only belonged to them through the general body.

XI. 1 It is further to be remarked, that sometimes a person has harm imposed upon him, or loses good, by the occasion indeed of another's fault, yet not so that the fault is the proximate cause of the action, so far as pertains to the right of acting. Thus he who has promised something on occasion of another's debt, suffers damage, as the old proverb says, *Suretyship is next door to mischief*; but the proximate cause of the obligation is his promise. For as he who is surety for a buyer, is not properly bound by the sale, but by his promise; so he who is bound for a delinquent, is not bound by the delict, but by his own engagement. And hence the loss which he has to bear is measured, not by the other's delict, but by the power which he had in promising.

2 From which it follows, that according to the opinion which we hold for the sounder, no body can be put to death in virtue of suretyship; because we hold that no one has such right over his own life,

credimus, occidi nemo possit ex fidejussione, quia statuimus neminem jus tale habere in vitam, ut eam sibi ipse adimere, aut adimendam obligare possit: cum veteres Romani Graeci que aliter ea de re senserint: ideoque et <sup>k</sup>vades capitali judicio crediderint obligari, ut in Ausonii est versu, et ex notissima Damonis et Pythias historia apparet: et obsides saepe capite plexerint, <sup>l</sup>ut alibi memorabimus. Quod de vita diximus, idem et de membris intelligi debet: nam et in illa jus homini datum non est, nisi corporis servandi causa.

3 Quod si exilium, si pecuniarum damnum in promissione fuerit, et alterius delicto impleta sit conditio, damnum feret fidejussor, quæ tamen in ipso, si exacte loquimur, poena non erit. Simile quid occurrit in eo jure quod quis habet sic ut ab alterius voluntate pendeat, quale est jus precarii,

<sup>k</sup> *Vades capitali judicio crediderint obligari]* Apertum id in verbia Rubenis ad patrem Jacobum Gen. xiii. 37. et apud Josephum II. *Antiqua Historia*, cap. vi. § 5. *Edit. Hudson.* Hos vades *ἀντιψύχους* animos vicarios vocat Eutropius Caligula; *ἴγυντας θανάτον*, mortis sponsores, Diodorus Siculus, in excerptis Peirescianis, [ubi de Damone: *ἴγυνος εὐθὺς ἐγενήθη θανάτον*.] Chrysostomus ad Galatas II. καθάπερ τινός καταδικασθέντος *ἀποθανεῖν*, ἔτερος

*ἀνεύθυνος ἐλόμενος θανεῖν ὑπὲρ ἄκειρον ἔξαρπάζει τὴν τιμωρίαν αὐτὸν* sicut homine aliquo ad mortem damnato, innocens alter pro illo se morti devovens illum supplicio liberat. [In cap. iii. 13. Tom. III. pag. 740. *Ed. Savil.*] Augustinus Epistola LIV. ad Macedonium: *et aliquando qui causa fuit mortis potius in culpa est, quam illa qui occidit: velut si quispiam decipiat fidejussorem suum, atque ille pro isto legitimam supplicium luat.* [Mirum heic ab Auctore

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that he can himself take it from himself, or bind himself to have it taken: though the ancient Romans and Greeks thought otherwise on this point: and therefore held sureties to be bound to undergo capital punishment for their principal, as it is in the verse of Ausonius: [*Who takes death as a substitute for another? The Surety.* *Quis subit in pœnam capitali judicio?* *Vas.* Gronov.], and as appears in the well known story of Damon and Pythias\*: and hostages have often been put to death, as we have elsewhere stated. What we have said of life, may also be said of limb: for man has no right to sacrifice that, except for the sake of preserving the whole body.

3 But if the promise included the expatriation of the promiser, or the payment of a sum of money, and the condition be not fulfilled by the fault of another, the person who gives such security must bear the loss; which, however, properly speaking, is not a punishment. Something similar occurs in any right which a person has in such a way that it depends on the will of another; such as a right granted to be held during the pleasure of the grantor, and even the right of pri-

\* The right name is Phintias, Cic. Off. III. 10. Gronov.

respectu habito ad rei dominium; et jus privatorum, respectu habito ad eminens dominium, quod utilitatis publicæ causa civitas habet. Nam si quid tale alicui auferatur occasione delicti alieni, poena in illis proprie non est, sed exsecutio juris antecedentis, quod erat penes auferentem. Sic quia in bestias proprie delictum non cadit, ubi bestia occiditur, <sup>L</sup>ut lege Mosis ob concubitum cum homine, non ea vere poena est, sed usus dominii humani in bestiam.

XII. His distinctionibus positis, dicemus, neminem delicti immunem, ob delictum alienum, puniri posse. Cujus rei ratio vera non est ea, quam adfert Paulus jurisconsultus, quod pœnæ constituentur in emendationem hominum: nam exemplum videtur statui posse etiam extra personam delinquentis, in ea tamen persona quæ ipsum tangat, ut mox dicemus; sed quia obligatio ad pœnam ex merito oritur: meritum autem

Eutropium, Scriptorem Latinum, testimoniū adserri vocis Graecæ Ἀντίψυχος de Vadibus usurpatæ. Neque vocem illam reperiri putet in Versione Graeca Paeanii. Sed Auctor noster, dum festinaret, nec satis attenderet, scripsit Eutropium, pro DIONE CASSIO: hic enim, ubi loquitur de Publio Afranio Potito, et Atanio Secundo, qui Caligula ægrotante juraverant sese mortem sponte quaesiuros, si ille fato fungeretur, ita ait,

ἡλπίζον παρ' αὐτοῦ, με καὶ ΑΝΤΙΨΥΧΟΙ οἱ διοθανεῖν ιθελήσαντες, &c.  
Lib. LIX. pag. 741 b. Ed. H. Steph.  
Ceterum de re ipsa, ut et de voce, vide SALMASIUM in Spartan. Hadrian. c. 14. et Clariss. CLERICUM, in Matth. xx. 23. post Hammondii Adnotat. J. B.]  
<sup>L</sup> Ut alibi memorabimus] Libro III. cap. iv. § 14.  
Ut lege Mosis] De qua vide Maimonidem Ductore Dubitantium III. 40.

vate property, which is liable to be interfered with by the *dominium eminens*, which the state has for public purposes. If any thing of this kind is taken away from any one on account of the fault of another, it is not properly a punishment, but the execution of a pre-existing right, which was in the hands of him who takes the precarious right away. And inasmuch as brutes are not capable of punishment, when a beast is put to death, as in the case provided for in the law of Moses, this is not really punishment, but the exercise of human dominion over the beast.

XII. Having premised these distinctions, we say that no one innocent of delict can be punished for the delict of another. But the true reason of this, is not that which is given by Paulus, that punishment is instituted for the amendment of men: for it would seem that an example may be made even extraneously to a man's own person, in a person whose welfare affects him, as we shall soon have to shew: but because liability to punishment arises from desert: and desert is a personal quality, since it must have its origin in the will, than which nothing is more peculiarly ours: it is, as we may say, *self-causing*.

est personale, quippe ex voluntate ortum habens, qua nihil est magis nobis proprium, unde αὐτεξούσιον vocatur.

XIII. 1 *Neque virtutes, neque vitia parentum,* inquit Hieronymus, *liberis imputantur.* Augustinus vero, *Deus, ait, ipse foret injustus, si quenquam damnaret innoxium.* Dion Chrysostomus oratione ultima, cum sanctione Atheniensium adjecta Solonis legibus devoveri posteros dixisset, de Dei lege haec subjicit: πλὴν παῖδας καὶ γένος οὐκ ἐπέξεισιν, ως ἔκει, τῶν ἀμαρτανόντων ἀλλ ἔκαστος αὐτῷ γίνεται τῆς ἀτυχίας αἵτιος verum hæc non, ut illa, liberos et posteros peccantium punit: sed sibi quisque fit infortunii causa. Et hoc illud vulgatum pertinet: *noxa caput sequitur.* Sancimus, aiunt Imperatores Christiani, ibi esse pœnam, ubi et noxa est. Deinde: *peccata igitur suos teneant autores: nec ulterius progrediatur metus, quam reperiatur delictum.*

*Epist. 3. de morte Nepot. p. 23 L. Tom. I.  
Epist. 105. (aut postius 106, ubi tam  
men verba non eadem.)  
Immo Jovis p. 667 d.*

*L. Sancimus.  
22. C. de panis.*

*Lib. II. de leg. spec. p. 802 L.*

2 Justum est, ait Philo, eorum esse pœnas quorum sunt peccata; reprehendens morem quarundam gentium quæ ty-

\* Ait Philo] Idem libro de Pietate, [Immo de Nobilitate, pag. 910. in fin. Confudit Auctor, lapsu memorie, εὐσέβειαν cum εὐγενείᾳ.] οὐκ οὐδεὶς βλαβερώτερά γένοντ' ἀν εἰσήγησι, εἰ μήτε τοῖς ἐξ ἀγαθῶν πονηρούμενοις ἀπακολουθεῖ τιμωρὸς δίκη, οὐτε τοῖς ἐκ πονηρῶν ἀγαθοῖς ἔρχεται τιμὴ, τοῦ νόμου δικαζοντος ἔκαστον αὐτὸν δφ' ἑαυτοῦ μὴ συγγενῶν δρεταῖς ἀπαινεῦντος ἡ (addendum hic kakalais) κολαζο-

τος\* haud scio an possit ullum pejus induci institutum, quam si nec malos e bonis genitos sequetur pœna, nec honos habebitur bonus qui ex malis parentibus nati sunt. Aliter lex quæ de suis actionibus quemque judicat, non ex cognatorum virtutibus laudat, aut ex eorundem vitis punxit. Josephus (Ant. Jud. XIII. cap. xiv. § 2. secundum divis. Hudson.) contrarium factum in rege Iudeorum Alexandro vocat ὑπὲρ διθρωπον δίκην,

XIII. 1 *Neither the virtues nor the vices of parents, says Jerome, are imputed to the children: and Augustine, God would be unjust if he condemned an innocent person.* Dio Chrysostom says of the law of God, speaking on the occasion of Solon's law, by which the children were stigmatised; *this law does not, like that, punish the children of criminals; in this, every one is his own cause of suffering.* And hence the rule, *Noxa caput sequitur, Punishment is personal.* So the Christian Emperors direct.

2 It is just, says Philo, that those should have the penalty who had the sin: reprehending the manner of some nations which punished with death the children of traitors or tyrants. The same custom is blamed\* also by Dionysius, who shows that the reason sometimes

\* No, says Barbeyrac: Dionysius leaves the matter undecided. See the place, Lib. VIII. c. 80.

rannorum aut proditorum insontes liberos morte puniebant. Quem reprehendit 'et Dionysius Halicarnassensis, ostenditque iniquam esse rationem quæ obtenditur, quod parentibus similes futuri putantur, cum id incertum sit, nec incertus metus ad mortem cujusquam sufficere debeat. Nescio quis Christiano Imperatori Arcadio ausus est hoc dictare, debuisse paterno perire suppicio, in quibus paterni criminis exempla metuntur: et Ammianus narrat interremtam sobolem, parvam etiam tum, ne ad parentum exempla succresceret. Nec magis justa causa metus ultionis, unde natum est Graecum proverbium:

Desipit occidens patrem qui pignora servat.

3 At Seneca: *nihil est iniquius quam aliquem heredem paterni odii fieri.* Attagini, qui Thebanis ad Medos deficiendi auctor fuerat, liberos nullo malo affecit Pausanias Græcorum Imperator, φὰς τὸν Μηδίσμον παῖδας οὐδὲν εἶναι μετατιτίους dicens illos extra culpam esse partium Medicarum. Marcus Antoninus in epistola ad Senatum: °quare

*exactionem penæ quæ humanum excedit modum.* Ovidius:

Illic immeritam maternæ pendere lingue Andromedam penas injustus jussratur Ammon.

(*Metam.* Lib. iv. vers. 668.)

' Minime reprehendit, sed in medio relinquit, utrum mos ille sit justus, an injustus. Inspice locum, Lib. viii. c. 80. J. B.

° *Quare filius Avidii Cassii*] Vide

Vulcatium vita Avidii, (cap. 12.) Laudat parem Constantii humanitatem Julianus: (*Orat.* ii. p. 100, 101. *Ed. Spanh.*) ostenditque sepe ex malis parentibus bonos venisse liberos, sicut e saxis apes evolant, e ligno amaro nascentur ficus, e spinis prodit pomum Punicum. Eiusdem hæc sunt: δλλά καὶ τὸν παῖδα τοῦ τετελευτικότος [τετολμηκότος habent Edd.] νήπιον κομιδὴ τῆς πατρώς οὐδὲν εἰσας μετασχεῖν ζημιας.

given is fallacious, that the children will probably be like their parents; since that is uncertain, and an uncertain fear ought not to cause any one's death. Some Christian did venture to advise the emperor Arcadius, that these ought to suffer the same punishment as their parents, in whom the repetition of their parents' crime was feared: and Ammianus relates that a family was put to death, even at an early age, *that they might not grow up to be like their parents.* Nor is fear of revenge a more just cause of such proceeding, notwithstanding the Greek proverb, *Who kills the sire and spares the son is mad.*

3 Seneca on the other hand says, Nothing is more unjust than to make a man the heir of his father's odium. When Attagines was the means of the Thebans deserting to the Medes, Pausanias did not harm his children: *they had had nothing to do with Medicizing,* he said. M. Antoninus, in an epistle to the senate, wrote, *You will pardon the wife*

*filiis Avidii Cassii (is in eum conjuraverat) et genero et uxori veniam dabitis. Et quid dico veniam, cum illi nihil fecerint?*

*Exod. xx. 5.*

XIV. 1 Deus quidem in lege Hebræis data paternam impietatem in posteros se vindicaturum minatur: sed ipse jus dominii plenissimum habet, ut in res nostras, ita in vitam nostram, ut munus suum, quod sine ulla causa et quovis tempore auferre cuivis quando vult potest. Igitur si morte immatura ac violenta rapit liberos Acanis, Saulis, Jeroboami, Achabi, <sup>P</sup>in ipsos jure dominii, non pœnæ, utitur, sed eodem facto gravius punit parentes. Nam sive superstites sunt, quod maxime spectavit lex divina, atque ideo lex minas istas <sup>q</sup>ultra abnepotes non extendit, Exod. xx. 5, quia ad eorum conspectum pertingere potest humana ætas: certum est parentes puniri tali spectaculo: gravius enim id illis quam quod ipsi ferunt: ut a Chrysostomo recte dicitur, quicum consentit Plutarchus, οὐ λυποῦσα μᾶλλον ἐτέρα κόλασις η τοὺς ἔξ εἰστῶν κακὰ πάσχοντας δί αὐτοὺς ὥραν· nullum durius supplicium, quam eos qui ex se sunt ob se miseros

*Jos. vii. 24.  
2 Sam. xxii.  
1 Reg. xiv.  
2 Reg. viii.  
19, 20.*

*Homil. 29. in  
2. Gen. Tom.  
I. p. 231.  
De seru Numb.  
vind. p. 561 A.*

οὕτω σοι πρὸς ἀπειλεῖσαν η πρᾶξις φέ-  
ποντα τελεῖς ἀρτῆς ὑπάρχει γνώ-  
ρισμα: etiam mortui filium infantem ad-  
modum non sivisti pona paterna impli-  
cari; ita tua agendi ratio ad lenitatem  
semper vergens perfectæ virtutis est tes-  
timonium. (Orat. 1. in fin. pag. 49 A.)

<sup>P</sup> In ipso jure dominii non pena

utitur] Haec est sententia Rabbini Si-  
meonis Barsema, lounge verissima.

<sup>q</sup> Ultra abnepotes non extendit] Ex-  
empla habes in Zimri et Jehu.

<sup>r</sup> Ut vel posteritatis suis propisci-  
entes legi divinae obedirent] Alexander  
apud Curtium libro VIII. Non oportet  
vos scire quid de his statuisse, quo

and the son-in-law of Avidius Cassius (who had conspired against him). But why do I say pardon, when they have committed no offense?

XIV. 1 God indeed, in the law which he gave the Hebrews, threatens that he will visit the impiety of the fathers upon their posterity. But God has the most plenary right of dominion, as over our goods, so over our lives, as his gift; which he may take away from any one, whenever he will, and without any cause. If, therefore, he takes away, by an untimely and violent death, the children of Achan, Saul, Jeroboam, Ahab, he uses towards them his right of dominion, not of punishment; but by the act, he more grievously punishes the parents. For if they outlive their children, which is the case that the divine law principally regards; (and therefore the law does not extend its threatenings beyond great grandchildren, Exod. xx. 5: because the common age of man allows him to see them;) it is certain that then they are punished by such a spectacle; for that is

*spectare* : sive non eosque provivunt, tamen cum eo metu occidere magnum est supplicium. *Duritia populi*, inquit Tertullianus, *ad talia remedia compulerat*, <sup>Adv. Marc.</sup> *ut vel posterita-* <sup>Il. 15.</sup> *tibus suis prospicientes legi divinæ obedirent.*

2 Sed simul notandum est, hac graviore vindicta non uti Deum, nisi adversus scelera proprie in suam contumeliam perpetrata, ut falsos cultus, perjurium, sacrilegia. Nec aliter Græci existimarunt: nam quæ crima credita sunt posteritatem obstringere, <sup>“</sup>quæ ἄγνη ipsi vocant, omnia istius sunt generis: quo de argumento facunde disserit Plutarchus, libro de sera Numinis vindicta. Exstat <sup>‘</sup>apud Ælianum oraculum tale Delphicum :

At scelerum fontes divinum persecutur jus,  
Nec pote vitari; non si genus ab Jove ducant:  
Sed capiti ipsorum quique enascuntur ab ipsis  
Imminet; inque domo cladem subit altera clades.

<sup>“</sup>Agebatur autem ibi de sacrilegio: quod et historia comprobatur auri Tholosani apud Strabonem et Gellium. De perjurio similes sententias supra adduximus. Deinde vero, etsi id comminatus

Lib. iv. p. 188.  
Lib. iii. 9.

*tristiores periretis.* (Cap. 8.)

<sup>“</sup>Quæ ἄγνη ipsi vocant] Vide Plutarchum *Pericle*: (Tom. i. pag. 170 A.) et quæ supra dicta hoc libro c. xliii. § 1.

<sup>‘</sup>Apud Ælianum] Libro III. 43.

<sup>“</sup>Agebatur autem ibi de sacrilegio]  
Ut et Libanius: ὃν οἱ μάνι ἔδοσαν ήδη  
δίκην, οἱ δὲ οὐπώ μέν. οὐκ ἔστι δὲ ὅτε

αὐτοὺς ἐξαιρήσεται. λέγω δὲ αὐτοὺς καὶ παιδας, λέγω καὶ τὸν δὲ ἐκεῖνων· quorum alii jam penas dedere, alii nondum quidem, sed nemo eos pena eximet: nec ipsos tantum dico, sed et liberos et etiis nascenturos. Similia habet idem Libanius oratione quam edidit Gothofredus.

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more grievous to them than what they themselves suffer, as Chrysostom says; or if they do not live so long, still, to die with such a fear hanging over them, is a great punishment. *The people's hardness of heart*, as Tertullian says, *led to such remedies, that they might obey the divine law, even out of regard for their posterity.*

2 But it is to be noted, at the same time, that God does not make use of this heavier kind of punishment, except towards offenses especially tending to his dishonour, as false worship, perjury, sacrilege. Nor did the Greeks judge otherwise; for the crimes which were supposed to entail a curse on posterity, are all of this kind; as Plutarch learnedly shews in his book On the procrastinated anger of the gods. In Elian, we have an oracle which says that the guilty cannot escape, but that vengeance follows them and their posterity. But there, sacrilege was in question, as is proved by the history of the Thelosan gold. We have above adduced similar opinions concerning perjury. Moreover, though God has threatened this, he does not always use his power, especially if

ver. 20.

est Deus, non tamen semper eo jure utitur, maxime si <sup>x</sup>insignis quædam virtus in liberis eluceat, ut videre est Ezech. cap. xviii. et exemplis quibusdam a Plutarcho dicto loco probatur.

3 Et cum in novo federe apertius quam olim declarata sint supplicia, quæ impios post hanc vitam manent, <sup>y</sup>ideo in eo federe nulla exstat comminatio personas peccantium egrediens; quo præcipue, quanquam minus aporte, ut mos est vatisbus, spectat dicta jam Ezechielis oratio. Factum autem illud Dei hominibus imitari non licet: neque par ratio est, quia, ut jam diximus, Deus sine culpæ intuitu jus habet in vitam; homines non nisi ex gravi culpa, et quidem quæ personæ sit propria.

Denuo. xxiv.  
16.

4 Quare eadem illa divina lex, ut parentes pro liberis, ita ob parentum facta liberos mortis poena affici vetat: quam legem <sup>z</sup>pii reges etiam in perduellibus seuti leguntur: eamque legem

<sup>x</sup> *Insignis quædam virtus]* Et publica paterni criminis detestatio, qualem fecit Andronicus Palseologus Imperator, apud Gregoram libro vi. pag. 81. (*Ed. Colon, seu Genov. 1616.*)

<sup>y</sup> *Ideo in eo federe nulla exstat comminatio personas peccantium egrediens]* Tertullianus de *Monogamia*: *desivit uva acerba a patribus manducata dentes filiorum obstupesfacere: unusquisque enim in suo delicto morietur.* (Cap. 7.)

<sup>z</sup> *Pii reges]* Ut Amaias (II. Reg. xiv. 6.)

<sup>z</sup> *Nil de tali lege apud ISOCRATEN,* in laudatione Busiridis, ad quam Auctor nos remittit, nec alibi, quod sciām: immo de illa silere video eos, qui ex professo mores et leges Ægyptiorum colegerunt, e. g. BOSCLEMUS, Tom. II. Dissert. xxiii: MARSHAMUS, in *Canone Chronicō, &c.* Occasionem errori dederunt verba ista, οὐδὲ εἰ τὸ ταῦτα διαβληθῆσθαι τὰς τυμωράς, etc. quae leguntur pag. 226 c. *Ed. H. Steph.* Sed ubi agitur de vindicta divina, quam putabant Ægyptii non differri, ut pos-

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the children turn out eminently virtuous; as see Ezek. xviii., and as Plutarch proves by examples.

3 And since, in the New Testament, the punishments are declared more clearly than before, which await the wicked after this life; therefore in that law there is no threatening of punishment which goes beyond the persons of the offenders: to which especially, though less openly, as the manner of the prophets is, that prophecy of Ezekiel looks. But this fact on the part of God is not to be imitated by men; nor is the reason alike: because, as we have said, God has a right over men's lives without regarding their faults: but men have such a right only on the ground of a graver fault, and one which belongs especially to the person.

4 Wherfore the same divine law, as it forbids parents to be capitally punished for their children, so does it forbid children to be so punished for their parents. And this law pious kings have observed, even with regard to their open enemies; and the rule is greatly praised by Josephus and Philo, as also a similar law of Egypt by Iso-

valde laudant Josephus et Philo, ut et similem AEgyptiam Lib. iv. 8. §. 30.  
<sup>De Leg. Spec.</sup>  
<sup>2</sup>Isocrates, et Romanam <sup>a</sup>Dionysius Halicarnassensis. Platonis est πατρὸς ὄνειδη καὶ τιμωρίας παιδῶν οὐδενὶ ξυνέπεοθαι. Quod Latine ita exprimit Callistratus Jurisconsultus: *crimen vel pœna paterna nullam maculam filio infligere potest.* Ad-dita causa: *namque unusquisque ex suo admisso sorti subjicitur, nec alieni criminis successor constituitur.* Ferretne, inquit Cicero, *ulla civitas latorem istiusmodi legis, ut condemnetur filius aut nepos, si pater aut avus delinquissent?* <sup>Lib. iii. de nat. Deor. c. 38.</sup> Hinc factum ut <sup>b</sup>prægnantem mulierem mortis supplicio afficeret nefas habitum sit <sup>3</sup>AEgyptiorum, <sup>4</sup>Græcorum, et <sup>c</sup>Romanorum legibus.

XV. Quod si injustæ leges humanæ, quæ liberos occidunt ob parentum delicta, injustior sane lex Persarum et Macedo-

<sup>Dan. vi. 24.</sup>

<sup>Just. x. 2.</sup>

teri demum illam experientur. J. B.

<sup>a</sup> Dionysius Halicarnassensis] Qui sic ait Lib. VIII. (c. 80) τὸ έθος τούτο Πρωταρίους ἐπιχάριους γέγονεν, ἀφείσθαι τῆς τιμωρίας ἀπάσης τοὺς παῖδας, ὃν ἀν οἱ πατέρες ἀδικήσωσι· mos ille Romanus proprius, a pœna omni liberos extimere quorum parentes deliquerunt. Habebit idem lex Wisigothica libro vi. tit. 1. cap. 8. [Non aperte laudat morem illum Dionysius Halicarnassensis, ut jam observavimus, et ex inspectione loci patet. J. B.]

<sup>b</sup> Prægnantem mulierem mortis supplicio afficeret nefas habitum] Laudat Philo libro de Humanitate, (pag. 710.)

<sup>c</sup> Vide DIODORUM SICULUM, Biblioth. Lib. I. cap. 77. J. B.

<sup>4</sup> Præter Historicum Græcum, modo laudatum, vide PLUTARCHUM, De sera Numinis vindicta, pag. 552 d. Tom. II. Ed. Wech. et ÆLIANUM, Var. Hist. Lib. v. cap. 18. J. B.

<sup>c</sup> Romanorum] L. Imperator Adrianus, 18. D. de statu hominum. l. prægnantis, 3. D. de pœnis.

crates, and one of Rome by Dionysius\*. And it is one of Plato's Laws, that the ignominy and punishment of the father are not to fall upon the children. So Callistratus the Jurist, adding the reason, that a man does not succeed to the crimes of another. *Would any city, asks Cicero, have a law condemning the son or grandson for the delinquencies of the father or grandfather?* Hence to put to death a pregnant woman was held inadmissible by the laws of the Egyptians, Greeks, and Romans.

XV. But if those human laws are unjust which put to death children for the offenses of their fathers, still more unjust was the law of the Medes and Persians, which devoted to destruction the lives of the relatives of the criminal, in order that death might be more bitter to those who had offended against the king, as Curtius speaks; a law which surpasses all others in cruelty, as Ammianus Marcellinus says.

XVI. This, however, is to be noted, that if the children of enemies have anything which is not their own, but of which the right

\* See Barbeyrac's corrections of these references.

ligrantia, puniri potest, ut diximus:) si queratur an is populus malo possit affici ob regis aut rectorum facinora: non jam querimus & si ipsius populi consensus accesserit, aut factum aliud quod per se sit pena dignum, sed agimus de eo contactu qui ex natura oritur ejus corporis cuius caput est rex, membra ceteri. Deus quidem ob Davidis peccatum populum pestilentia confecit, et quidem ut David censemt innocentem, sed Deus in vitam ipsorum jus habebat plenissimum.

2 Interim haec pena erat non populi, sed Davidis: nam, ut ait scriptor Christianus, πικροτάτη τιμωρία τῶν ἡμαρτη-<sup>Quæst. ad  
κότων βασιλέων ή τιμωρία τοῦ λαοῦ acerbissimum est delin-</sup><sub>orth. 138.</sub>  
*quentibus regibus supplicium id quod populis infligitur.* Perinde enim hoc est, ait idem scriptor, ac si quis qui manu peccavit in tergo feriatur: quomodo in simili arguento Plutarchus non aliter id ait accipendum quam si medicus ad curandam coxam urat pollicem. Hominibus cur id non liceat <sup>De aera  
Num. viii. vñd.</sup> p. 539 n. jam antea diximus.

<sup>1</sup> *Honoribus prohibiti sunt]* Simile reperies in C. in quibusdam, 12. *De Panis.* (*DECRETAL. v. 37.*)

<sup>2</sup> *Si ipsius populi consensus accesserit]* Philo de Ægyptii religi subditis Abrahami tempore. (*De Abrab.* pag. 363 d.) παραπήλαυσε δὲ τῆς τιμωρίας σύμπτας αὐτῷ ὁ οἶκος, μηδενὸς ἐπὶ τῇ παρανομίᾳ δυσχεράντως, ἀλλὰ πάντων ἔνεκα τοῦ συναινεῖν μονονοῦ συγχειρουργούσαντων τὸ δίλκημα sensit et parnam omnis cum eo familia, quod nemo indignatus esset super injuste facto, sed

*omnes laudando pene et ipse illud fecissent.* Josephus, ubi vaticinium contra Jeroboam prolatum narrat: μεθέξει δὲ τῆς τιμωρίας καὶ τὸ πλῆθος ἐκπεσόν τῆς ἀγαθῆς γῆς, καὶ διασπαρέν εἰς τὸν πέραν Εὐφράτου τόπους, ὅπει τοῖς τοῦ βασιλέως ἀσεβίμασι κατηκολούθησε· *particeps paucus et populus erit, excidet quippe felice terra, sparsusque per loca transeuphratensis exsulabit, quod impicitati regis socium se fecerit.* (*Ant. Jud. Lib. viii. cap. xi. § 1.* *Ed. Hudson.*)

ple's consent has been obtained, or if they have done anything which is by itself worthy of punishment; but we inquire concerning the connexion which naturally arises between that body of which the king is the head, and of which others are the members. God, on account of the sin of David, wasted the people with a pestilence; the people being innocent, as David judged: but God had a plenary right over their lives.

2 In the mean time, this was not the punishment of the people, *ut of David;* for as a Christian writer says; *The sharpest punishment of offending kings is the punishment of their people.* It is, as the *ne writer says,* as if one who has sinned with his hand were to be fished with strokes on his back: as Plutarch says, it is no otherwise when a physician cauterizes the thumb to cure the hip. Why may not lawfully do the same, we have already said.

XVIII. Idem dicendum de singulis, qui non consenserunt, malo afficiendis circa ea quæ ipsorum sunt, ob delictum universitatis.

L. 28. D. 4c  
penis.

Pag. 220 c.

XIX. Hæres vero cur de ceteris debitis teneatur, <sup>b</sup> de pena non teneatur, sicut a Paulo jurisconsulto scriptum est, *si pena alicui irrogatur, receptum est commentatio jure ne ad haeredes transeat, vera causa hæc est, quod hæres personam defuncti refert, non in meritis quæ sunt mere personalia, sed in bonis, quibus ut cohærerent ea quæ alicui debentur ex ipsa rerum inaequalitate, simul cum dominio fuit introductum. Dion Prussænensis Rhodiaca: ἀπαγγέλλοντι τὰ τῶν προγόνων οὐχ ἡττον αὐτῶν ἐκείνων εἰς οὓς ἀν τοτε καθήκετο γένος. οὐ γάρ ἀφίστασθαι φήσετε τῆς διαδοχῆς· quæ debuerunt majores, ea non minus debent posteri; neque enim dicere potestis repudiatam a nobis hereditatem.*

XX. Et hinc sequitur, ut si ultra meritum nova quedam causa obligationis extiterit, deberi jam possit id quod in pena erat, quanquam non proprie ut pena. Sic alibi post sententiam, alibi post litem <sup>c</sup> contestatam, quibus rebus vis contractus

<sup>b</sup> *De pena non teneatur]* Maimonides titulo הילן c. vii. sectione 6. Geomara Baba Cama cap. x. § 1.

<sup>c</sup> *Sed in bonis]* Vide Concilium Tolletanum VIII. in causa Recceswinthi: vide quæ supra hoc libro, c. xiv. § 10. Nulla est persona quæ ad vicem ejus

qui e vita emigraverit proprius accedat quam hæres, ut Cicero ait secundo *de Legibus*, (cap. 19.)

<sup>d</sup> Ita Jure Civili Romanorum. Vide L. 26 et 58. *D. De Oblig. et act. L. 139, 164. De divers. Reg. Jur. L. 3. § 11. De Peculio.*

XVIII. The same may be said of the evil inflicted through their property, or the like, upon individuals who have not consented to the crime, on account of the delict of the general body.

XIX. If we ask why, since the heir is bound to the other debts of the deceased, he is not bound to his punishment, as Paulus says the commentators\* have decided, this is the true cause; that the heir represents the person of the deceased, not in his deserts, which are matters merely personal, but in his possessions; and with them are inseparably connected his debts; and accordingly this rule came in as soon as ownership came in. So Dio Prussænensis.

\* *Commentatio jure]* Difficile satis est definire, quid intelligat Paulus, dum illud *jus commentitium* vocat. Vide A. FABRUM, *Jurispr. Papinian. Tit. I. Princip. II. Illat. 5. MARC. LYCKLAMAM, Membran. I. 9. JAC. GOTTHOFRED. in L. 1. De Regg. Jur. pag. 5. CL. SCHULTING. *Jurisprud. Ante-Justin.* pag. 675. col. 1. trit. Expendi etiam potest nova interpretatio, quæ legitur in *Actis Eruditorum Lipsiensibus*, ann. 1714. pag. 555. ubi vult Auctor Clar. WÆCHTERUS, *jus commentitium esse, quod ex notione quadam communi oritur.* J. B.*

datur, poena pecuniaria ab herede debebitur, ut et ea quæ in conventionem deducta est. Jam enim nova accessit debendi causa.

<sup>7</sup> Vide L. 47. D. de Actionib. emti et vend. Sed haec eat poena impropre dicta.

XX. And hence it follows that if, besides desert, some new cause of obligation should arise, that which was a part of the punishment may become debt, though not as a punishment of the heir. Thus, after the sentence of a court, or after the decision of a lawsuit, to which events the power of a contract is given, the pecuniary penalty will be due from the heir, as also matters which were agreed to be so decided. For these events are a new cause of a debt being due.



## CAPUT XXII.

DE CAUSIS INJUSTIS.

- I. *Explicatur discrimen inter causas justificas et suasorias.*
  - II. *Bella, quae utroque causarum genere carent, ferina esse.*
  - III. *Bella, quae suasorias causas habent, non justificas, esse praedonum.*
  - IV. *Quasdam esse causas, quae falsam habeant justi speciem:*
  - V. *Ut metum incertum:*
  - VI. *Utilitatem sine necessitate:*
  - VII. *Negatum matrimonium in magna foeminarum copia:*
  - VIII. *Cupiditatem melioris soli:*
  - IX. *Inventionem rerum occupatarum ab aliis.*
  - X. *Quid si priores occupatores amentes sint?*
  - XI. *Injustam causam esse et libertatis desiderium in populo subdito:*
  - XII. *Et voluntatem regendi alias invitatos quasi ad ipsorum bonum.*
  - XIII. *Item titulum universale imperii quem quidam adscrivunt Imperatori, qui refelluntur:*
  - XIV. *Alii Ecclesie, qui item refelluntur.*
  - XV. *Item voluntatem implendi vaticinia sine Dei mandato.*
  - XVI. *Item id quod debetur non ea jure stricte dicto, sed aliunde.*
  - XVII. *Distinctio belli cuius causa injusta, et ejus cui aliunde vitium accedit: et diversi utriusque effectus.*

Lub. il. 1.

I. 1 DIXIMUS supra, cum de causis agere institueremus, causas alias esse justificas, alias suasorias. Polybius, qui id discrimen primus notavit, <sup>1</sup> illas vocat *προφάσεις*, quia

\* *Illas vocat προφάσεις, quia palam proferri solent, (titulum dixit aliquoties Livius) has generis nomine αἰτίας] Sic et Plutarchus distinguunt in Galba, (pag. 1062 D.) et Dion in rebus Caesaris et Pompeii: [aut potius Xiphilin. p. 13. Ed. H. Steph.] et Polybius, ubi de Romanorum bello in Illyrios agit, excerpto legationum 125. Cum Suetonio recte illas *pretextum*, has *causas* dixeris. Ita enim ille de Julio Cæsare: *et pretextum quidem illi ciuilium armorum**

*hoc fuit: causas autem alias frisse op-  
nuntur, (cap. 30.) Thucydides alibi  
distinguit πρόφασιν et τὸ ἀληθές, (Lib.  
vi. c. 6) ut in Atheniensium mota ad-  
versus Sicilian, pretextum fuit optulari  
Egestanis, res ipse, cupiditas Sicilie  
sibi aquiriendae. Hermocrates in ora-  
tione de Atheniensibus loquens illud  
πρόφασιν praetextum vocat, hoc διενο-  
μα propositum. Utrumque est in libro  
Thucydidis vi. [postremum in cap. 33.  
ubi tamen est ἀληθές, ut in priori διε-  
νομα]*

Opus - XII. Of unjust Causes of War.

I. In the above, when we began to treat of the causes of war, - explanatory or justifying, some measure or

palam proferri solent, (titulum dixit aliquoties <sup>1</sup>Livius) has generis nomine *al̄t̄ias*.

2 Sic in bello Alexandri adversus Darium *πρόφασις* fuit ultio injuriarum quas Persæ Græcis intulerant, *al̄t̄ia* cupidus gloriæ, imperii, divitiarum, cui accedebat spes magna facilitatis concepta ex Xenophontis et Agesilai expeditionibus. Sic *πρόφασις* belli Punici secundi controversia de Sagunto, causa indignatio Carthaginiensium, ob pactiones quas Romani iniquis temporibus ipsis expresserant, et aucti spiritus ex secundis per Hispaniam rebus; quæ Polybio notata. Similiter Thucydides Lib. III. 6, 7, 8, belli Peloponnesiaci veram causam censem fuisse vires Atheni- Lib. I. 23, 26, ensum augentes et Lacedæmoniis suspectas, obtentum vero controversiam Corcyrensum, Potidæensium, et alia; <sup>b</sup> ubi

*vota*, quæ Auctor heic permutavit.] Appianus etiam *προφάσεων* vocem usurpat in Mithridatico, (pag. 209.) Idem civilium v. ubi de rupta pace inter Octavianum et Sextum Pompeium agit, dicit *al̄t̄ias* causas alias intus fuisse, alias quæ preferebantur, (pag. 716. Ed. H. Steph.) Agathias libro quinto id quod alii *πρόφασιν*, vocat *σκῆψιν καὶ προκάλυμμα*, figmentum et obtentum; cui opponit *al̄t̄ias* in historia Hunni Zaberganis. (cap. 5.) Adde quæ diximus supra libri hujus capite i. § 1. Procopius *Persicorum* II. dicit, stultum esse non libere loqui ubi dux est justitia, comes utilitas (cap. 15.)

<sup>1</sup> Exempli gratia, Lib. XXXVII. cap. 54. num. 13. J. B.

<sup>b</sup> *Ubi tamen ille al̄t̄ias et προφάσεων nomina permisceret?* Sic et libro v. (c. 53) de Argivis contra Epidaurios agens, quam prius vocaverat *πρόφασιν*, mox vocat *al̄t̄ias*, quomodo et Græcum *ἀρχῶν*, Latinum *principiorum* vocem, aliasque ejus generis, esse sensus ambiguus notavimus d. cap. i. § 1. hujus libri. Scriptores Constantinopolitani Imperii id quod alii *πρόφασιν* sive *πάτροκλον* vocant, nimurum ex Achillis historia, qui ad resumenda arma ex Patroculo sumpait materiam. [De hoc vide MEURSIUM, *Gloss. Græco-Barbar.* pag. 415. SALMASIUM, in *Achill. Tatium*, pag. 581. DUPORT. *Gnomolog. Homeric.* pag. 112.]

impelling. Polybius, who first noted this difference, calls the former *pretexts*, the latter, *causes*; Livy sometimes calls the former *titulus*\*.

2 Thus in the war of Alexander against Darius, the *pretext* was revenge for the injuries which the Persians had done to the Greeks; the *cause* was the desire of glory, empire, wealth, added to a great hope of the facility of the conquest, proved from the expeditions of Xenophon and Agesilaus. So the *pretext* of the second Punic war was the controversy concerning Saguntum, the *cause* was the indignation of the Carthaginians excited by the terms which the Romans had imposed upon them in their evil times, and their courage exalted by their successes in Spain; as Polybius notes. In the same way Thucydides judges that the true cause of the Peloponnesian war was the strength of the Athenians, increasing and drawing the suspicion

\* For example, Lib. XXXVII. c. 54. num. 13. J. B.

V. 1 Metum ergo ex vicina potentia non sufficere supra diximus. Ut enim justa sit defensio, necessariam esse oportet, qualis non est nisi constet, non tantum de potentia, sed et de animo, et quidem ita constet, ut certum id sit ea certitudine quæ in morali materia locum habet.

Zonar. ix. 15. Pausan. i. 10. Germ. c. 35. 2 Quare minime est probanda eorum sententia, qui justam belli causam statuunt, si vicinus nulla pactione impeditus in suo arcem faciat, aut munitionem aliam quæ damnum aliquando dare possit. Nam adversus tales metus contrariae in suo munitiones et siqua sunt similia remedia querenda sunt, non vis bellica. Injusta igitur bella Romanorum in Philippum Macedonem, Lysimachi in Demetrium, ni alia causa adfuit. Valde mihi placet Taciti illud de Chaucis : *populus inter Germanos nobilissimus, quique magnitudinem suam malit justitia tueri, sine cupiditate, sine impotentia : quieti, secretique : nulla provocant bella, nullis raptibus aut latrociniis populantur : idque præcipuum virtutis ac virium argumentum est, quod, ut superiores agant, non per injurias assequuntur : prompta*

\* Narrat id DIODORUS SICULUS, *Biblioth.* Lib. iv. c. 31. unde Auctor habet. Nam si sequamur APOLLODO-

RUM, Lib. ii. cap. 6. n. 1. exemplum hoc non faciet, quum, secundum istum, ex pacto peteret Iolem Hercules: vio-

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V. 1 That fear from a neighbouring power is not a sufficient cause, we have said above. For, that defense may be just, it must be necessary; and it cannot be this, except there be clear evidence, not only of the power, but of the *animus* of the party; and such evidence as amounts to moral certainty.

2 Hence we can by no means approve the opinion of those who hold it to be a just cause of war, if a neighbour, being prevented therefrom by no pact, establish a fortress on his own ground, or any other munition of war, which may possibly at some time be mischievous to us. For the proper remedies against such fears are opposing munitions, and the like, not force of arms. Therefore unjust were the wars of the Romans against Philip of Macedon, and of Lysimachus against Demetrius, except there were some other reason. I am much pleased with what Tacitus says of the Chauci : *The most noble people among the Germans, and a people that prefers to secure its greatness by its justice; not greedy, not passionate, but quiet and retired. They provoke no wars, they practise no robbery or plunder of their neighbours; and the great proof of their virtue and their strength is, that it is not by wrong-doing that they preserve their superiority. Yet they can promptly use arms, and if need be, raise armies: they are numerous in infantry and cavalry, and retain their*

*tamen omnibus arma, ac, si res poscat, exercitus: plurimum virorum equorumque, et quiescentibus eadem fama.*

VI. Nec utilitas par jus facit cum necessitate.

VII. Ita ubi laxa est matrimoniorum copia, negatum aliquod matrimonium causam bello præbere non potest: qualem olim Hercules arripuit in Eurytum, <sup>1</sup>Darius in <sup>5</sup>Seythas.

VIII. Nec magis mutandæ sedis amor, ut paludibus et solitudinibus relictis solum fecundius possideatur: quam Germanis veteribus bellandi causam fuisse ait Tacitus.

*Hist. iv. 73.*

IX. Aequa est improbum, inventionis titulo sibi vindicare ea quæ ab alio tenentur, etiamsi is qui tenet sit improbus, de <sup>Vict. de Ind.</sup> <sup>Id. l. n. 31.</sup> Deo male sentiens, aut hebetis ingenii. Nam inventio est eorum quæ nullius sunt.

X. 1 Neque ad dominium requiritur aut virtus moralis, aut religiosa, aut intellectus perfectio: nisi quod hoc videtur posse defendi, siqui sint populi omnino destituti a rationis usu, <sup>Vict. de Bello,</sup> <sup>n. 5, 6, 7, 8.</sup> eos dominium non habere, sed ex caritate tantum iis deberi <sup>Id. l. n. 18.</sup> quæ ad vitam sunt necessaria. Nam quæ alibi diximus de

latio autem fidei date justam bello <sup>gem: vide Xiphilinum (pag. 356 c.)</sup> caussam præbet. *J. B.* <sup>Ed. H. Steph.)</sup>

<sup>1</sup> *Darius in Scythas]* Antoninus Caracalla in Artabanum Parthorum re-

<sup>5</sup> *Vide JUSTINUM, Lib. II. cap. 5. n. 9. J. B.*

*reputation even in inaction.*

VI. Nor does utility generate a right, in the way in which necessity does.

VII. Thus when there is no want of opportunity of marriage, any marriage denied cannot supply a cause for war; though Hercules formerly took occasion to make war on Eurytus on such grounds, and Darius on the Scythians.

VIII. Neither is the desire of migrating from one place to another a just ground of war; that a nation leaving marshes and deserts, may become possessed of a more fertile soil; which Tacitus mentions as the reason of making war among the old Germans.

IX. It is no less unjust to claim lands on the ground of having discovered them, when they are occupied by another, even though the possessors be bad men, with wrong notions of God, and dull intellects. For those lands only can be discovered which belong to nobody.

X. 1 Nor is there required for ownership [to exclude such claim] either moral virtue, or religion, or perfection of intellect: except that this may, it would seem, be defended; that if there be any people altogether destitute of the use of reason, such may not have ownership, but out of charity those things ought to be given them

sustentatione domini, quam pro infantibus et amentibus facit jus gentium, ad eos populos pertinet cum quibus est pactorum commercium: tales autem non sunt populi si qui reperiuntur toti amentes, de quo merito dubito.

2 Male ergo Græci Barbaros ob morum diversitatem, forte et quod ingenio cedere viderentur, hostes sibi quasi naturaliter dicebant. Quatenus autem ob peccata gravia et naturam aut

*Plato. de R.P.*

v. p. 47<sup>o</sup> c.

*Ariad. Po.* i.

2.

*Eurip. Iphig.*

fr. Adul. 5.

1601, et seqq.

LIV. XXXL 23.

*Iover. Panath.*

p. 567 l.

*Hoc libro e.*

21. § 40.

alia est quæstio, et modo, cum de penarum jure ageremus, nobis tractata.

XI. Sed <sup>1</sup> nec libertas, sive singulorum sive civitatum, id est, *autoxonia*, quasi naturaliter, et semper quibusvis competit, jus bello præstare potest. Nam libertas cum natura competere hominibus aut populis dicitur, id intelligendum est de jure naturæ præcedente factum omne humanum, et de libertate *kata' stérēpsis*, non de ea quæ est *kai' éparthteta*, hoc est, ut natura quis servus non sit, non ut jus habeat ne unquam serviat: nam hoc sensu nemo liber est: quo pertinet illud Albutii: *neminem natum liberum esse, neminem servum; hæc postea*

*Senecc. III.*  
contr. 21.

<sup>1</sup> *Nec libertas sive singulorum sive civitatum, id est, autoxonia, quasi naturaliter et semper quibusvis competit, jus bello præstare potest]* Vide concilium IV. Toletanum, et quæ nos supra cap. IV. hujus Lib. § 14.

only which are necessary to life. For what we have said above, concerning the sustentation of ownership, which the law of nations performs for infants, and persons out of their mind, pertains to those peoples with whom others have an intercourse of pacts; and if there be any people altogether irrational, they are not such: but I much doubt the fact.

2 Therefore it was unjust on the part of the Greeks to say, that the Barbarians were their natural enemies, merely on account of the diversity of manners, or because they seemed to be inferior in intellect. How far dominion may be taken away from a people on account of grave offenses, impugning nature or human society, is another question, and must soon be treated by us, when we speak of the right of punishing.

XI. Nor again can we say of the liberty, either of individuals, or of cities, or states, (that is, *autonomy* or self-government,) that it is either by natural law, and at all times, an attribute of all, or that in the cases in which it is, it furnishes just ground for war. For when we say that liberty by nature belongs to men or to peoples, we are to understand that, of a natural right preceding all human pacts; and of liberty by negation of slavery, not of liberty in opposition to slavery;

*nomina singulis imposuisse fortunam.* Et Aristotelis illud : <sup>1. Polit. c. 3.</sup> νόμῳ τὸν μὲν δοῦλον εἶναι, τὸν δὲ ἐλεύθερον· e lege venisse ut alius esset liber, alius servus. Quare qui legitima causa in servitutem sive personalem sive civilem devenerunt, contenti sua conditione esse debent, ut et Paulus Apostolus docet : <sup>1 Cor. vii. 21.</sup> δοῦλος ἐκλήθης; μή σοι μελέτω· vocatus es ad servitutem? ne id te torqueat.

XII. Neque minus iniquum armis subigere aliquos velle, quasi dignos qui serviant, quos naturaliter servos interdum philosophi vocant. Non enim siquid alicui est utile, id statim mihi licet ei per vim imponere. Nam his qui rationis habent usum libera esse debet utilium et inutilium electio, nisi alterius quoddam in eos quæsumit sit. Infantum plane alia est <sup>Vict. de Ind. n. 24.</sup> ratio, quorum regimen, cum ipsi jus exercendæ αὐτοπραγίας actionumque suarum moderandarum non habeant, occupanti et idoneo natura concedit.

XIII. 1 Vix adderem stultum esse titulum, quem quidam tribuunt Imperatori Romano, quasi ipse etiam in remotissimos et incognitos hactenus populos jus imperandi habeat, <sup>Ayala de Jur. Bell. i. 2. n. 29. Covar. c. pec- catum. p. 2. § t. n. d. et seqq.</sup>

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so that man is not a slave by nature, but he is not by nature a creature that cannot be a slave. For in this latter sense, no one is free. And to this view pertains what is said by Albutius, that *No one is born free, and no one is born a slave*; these names came afterwards to belong to men by their fortune. So Aristotle says, that it is a result of law that one man is free, another a slave. Therefore they who have, by a legitimate course, come into slavery, either personal or civil, ought to be content with their condition; as St Paul teaches, *Art thou called being a servant? Care not for it.* <sup>1 Cor. vii. 21.</sup>

XII. Nor is it less unjust to wish to subjugate any by arms, as being worthy to be slaves, or as philosophers sometimes speak, naturally slaves. For even if there be anything which is fit for me, it does not follow that any one has a right to impose it on me by force. For those who have the use of reason, ought to have a free election left them of what is useful to them and what is not, except another have a right over them. The case is plainly different with infants, the government of whom, since they themselves have not the right of independent action and self-direction, nature gives to those who have a claim to it, and can exercise it.

XIII. 1 It would hardly be necessary to notice that the title given by some to the Roman Emperor is absurd, as if he had the right of ruling over the most remote and hitherto unknown peoples; except Bartolus, who was long held the prince of jurists, had ventured

num <sup>d</sup>devovens et propinquorum capita, quo qui in regem

Lib. viii. 8. Lib. xxiii. 6. peccabant tristiores perirent, ut Curtius loquitur: cuius legis diritate exsuperari leges omnes scripsit <sup>e</sup>Ammianus Marcellinus.

XVI. Illud tamen est notandum, siquid habeant aut expectare possint perduellium liberi, in quod jus proprium fit non ipsis, sed populo aut regi, id auferri ipsis posse jure quodam dominii, cuius tamen usus simul in poenam redundet eorum qui peccaverint. Huc refer quod <sup>f</sup>Antiphonis ut proditoris posteri ἀτιμοι ἐνεγράφησαν, narrante Plutarcho, id est <sup>g</sup>honribus prohibiti sunt, ut Romæ liberi a Sulla proscriptorum. Sic in dicta Arcadii lege illud tolerabile in liberos: *ad nullos honores, ad nulla sacramenta perveniant.* Servitus autem quomodo et quatenus in liberos sine injuria transeat, alibi a nobis est explicatum.

XVII. 1 Quod de liberis malo afficiendis ob parentum delicta diximus, idem aptari potest et ad populum vere subditum: (nam qui subditus non est, ex sua culpa, id est ex neg-

<sup>d</sup> *Devovens et propinquorum capita]*

Philo morem esse tyrannis dixit cum damnatio una tollere quinque familias eis proximas. Vide Herodianum libro III. Et exemplum Mediolanense occiso Galeatio apud Bizaram Lib. XIV. [Locus Philonis legitur Lib. II. *De Specialib. Legg.* pag. 802 D. sed insipienti patebit, sensum ejus valde mutatum fuisse ab Auctore nostro. Ille etiam, aut exscriptor, sine dubio posuit hec Herodianum, apud quem nil hue faciens re-

peritur, pro HERODOTO, qui Lib. III. cap. 119. narrat, Intaphernem, cum libera et universa familia, capite damnatum fuisse a Dario, secundum Persarum morem. *J. B.*]

<sup>e</sup> *Ammianus Marcellinus]* Abominandas leges vocat. Vide et Concilium Toletanum IV.

<sup>f</sup> Ita omnes Editiones: sed legendum Antiphontis. Vide locum PLUTARCHI, *Vit. I. Rhetor.* pag. 833 A. Tom. II. *J. B.*

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belongs to the people or the king, that may be taken from them by the right of dominion, the exercise of that right operating collaterally to the punishment of the criminal. To this we may refer the case of the children of Antiphon, who, as the children of a traitor, were excluded from honours; as at Rome were the children of those proscribed by Sulla. So in the law of Arcadius, that rule concerning children is not intolerable: *Let them be admitted to no honours nor public offices.* How far slavery may pass to children without wrong, we have treated elsewhere.

XVII. 1 What we have said of evil inflicted upon children for the delicts of fathers, may be applied also to a people really subject to their ruler: (for he who is not subject may be punished for his own fault, as we have said, that is, for neglecting to control the offender:) if it be asked whether such a people may be eviltreated on account of the crimes of the ruler or king. We do not now inquire if the Peo-

ligentia, puniri potest, ut diximus:) si queratur an is populus malo possit affici ob regis aut rectorum facinora: non jam querimus si ipsius populi consensus accesserit, aut factum aliud quod per se sit poena dignum, sed agimus de eo contactu qui ex natura oritur ejus corporis cuius caput est rex, membra ceteri. Deus quidem ob Davidis peccatum populum pestilentia confecit, et quidem ut David censem innocentem, sed Deus in vitam ipsorum jus habebat plenissimum.

2 Interim haec poena erat non populi, sed Davidis: nam, ut ait scriptor Christianus, πικροτάτη τιμωρία τῶν ιμαρτητῶν βασιλέων ἡ τιμωρία τοῦ λαοῦ acerbissimum est delinquentibus regibus supplicium id quod populis infligitur. Perinde enim hoc est, ait idem scriptor, ac si quis qui manu peccavit in tergo feriatur: quomodo in simili arguento Plutarchus non aliter id ait accipiendo quam si medicus ad curandam coxam urat pollicem. Hominibus cur id non liceat p. 559. De sera Num. vind.

<sup>1</sup> Honoribus prohibiti sunt] Simile reperies in C. in quibusdam, 12. De Pœn. (DECRETAL. v. 37.)

<sup>2</sup> Si ipsius populi consensus accesserit] Philo de Ægyptii regis subditis Abrahami tempore. (De Abrah. pag. 363 d.) παραπήλαυσε δὲ τῆς τιμωρίας σύμπτας αὐτῷ ὁ οἶκος, μηδὲν ἐπὶ τῇ παρανομίᾳ δυσχεράντως, ἀλλὰ πάντων ἔνεκα τοῦ συναινεῖ μονονού συγχειρουργησάντων τὸ ἀδίκημα sensit et penam omnis cum eo familia, quod nemo indignatus esset super injuste facto, sed

omnes laudando pene et ipse illud fecissent. Josephus, ubi vaticinium contra Jeroboam prolatum narrat: μεθέξει δὲ τῆς τιμωρίας καὶ τὸ πλῆθος ἐκτεσθετῆς ἀγαθής γῆς, καὶ διασπαρέτη τὸν πέραν Εὐφράτου τόπους, ὅπι τοῖς τοῦ βασιλέως δεσθήμασι κατηκολούθησε· particeps ράσα et populus erit, excidet quippe felice terra, sparsusque per loca transeuphratensis exsulabit, quod impetrati regis socium se fecerit. (Ant. Jud. Lib. viii. cap. xi. § 1. Ed. Hudson.)

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ple's consent has been obtained, or if they have done anything which is by itself worthy of punishment; but we inquire concerning the connexion which naturally arises between that body of which the king is the head, and of which others are the members. God, on account of the sin of David, wasted the people with a pestilence; the people being innocent, as David judged: but God had a plenary right over their lives.

2 In the mean time, this was not the punishment of the people, but of David; for as a Christian writer says; *The sharpest punishment of offending kings is the punishment of their people.* It is, as the same writer says, as if one who has sinned with his hand were to be punished with strokes on his back: as Plutarch says, it is no otherwise than when a physician cauterizes the thumb to cure the hip. Why men may not lawfully do the same, we have already said.

XVIII. Idem dicendum de singulis, qui non consenserunt, malo afficiendis circa ea quæ ipsorum sunt, ob delictum universitatis.

*I. 20. D. de  
penis.*

XIX. Hæres vero cur de ceteris debitis teneatur, <sup>h</sup> de poena non teneatur, sicut a Paulo jurisconsulto scriptum est, *ei paena alicui irrogatur, receptum est commentitio jure ne ad hæredes transeat, vera causa hæc est, quod hæres personam defuncti refert, non in meritis quæ sunt mere personalia, sed in bonis, quibus ut cohærerent ea quæ alicui debentur ex ipsa rerum inæqualitate, simul cum dominio fuit introductum.* Dion. Prusæensis *Rhodiaca*: ἀπαντα ὄφειλουσι τὰ τῶν προγόνων οὐχ ἡττον αὐτῶν ἐκείνων εἰς οὓς ἀν ποτε καθήκετο γένος. οὐ γὰρ ἀφίστασθαι φήσετε τῆς διαδοχῆς· quæ debuerunt majores, ea non minus debent posteri; neque enim dicere potestis repudiatam a nobis hereditatem.

Pag. 329 c.

XX. Et hinc sequitur, ut si ultra meritum nova quædam causa obligationis extiterit, deberi jam possit id quod in poena erat, quanquam non proprie ut poena. Sic alibi post sententiam, alibi post litem <sup>e</sup> contestatam, quibus rebus vis contractus

<sup>b</sup> *De pena non teneatur]* Maimonides titulo יולין c. vii. sectione 6. Ge. mara Baba Cama cap. x. § 1.

<sup>c</sup> *Sed in bonis]* Vide Concilium Tolestanum viii. in causa Recceswinthi: vide quæ supra hoc libro, c. xiv. § 10. Nulla est persona quæ ad vicem ejus

qui e vita emigraverit proprius accedat quam hæres, ut Cicero ait secundo *de Legibus*, (cap. 19.)

<sup>d</sup> Ita Jure Civili Romanorum. Vide L. 26 et 58. *D. De Oblig. et act. L. 139, 164. De divers. Reg. Jur. L. 3. § 11. De Peculio.*

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XVIII. The same may be said of the evil inflicted through their property, or the like, upon individuals who have not consented to the crime, on account of the delict of the general body.

XIX. If we ask why, since the heir is bound to the other debts of the deceased, he is not bound to his punishment, as Paulus says the commentators\* have decided, this is the true cause; that the heir represents the person of the deceased, not in his deserts, which are matters merely personal, but in his possessions; and with them are inseparably connected his debts; and accordingly this rule came in as soon as ownership came in. So Dio Prusæensis.

\* *Commentitio jure]* Difficile satis est definire, quid intelligat Paulus, dum illud *jus commentitium* vocat. Vide A. FABRUM, *Jurispr. Papinian. Tit. I. Princip. II. Illat. 5. MARC. LYCKLAMAM, Membran. I. 9. JAC. GOTHOFRED. in L. 1. De Regg. Jur. pag. 5. CL. SCHULTING. Jurisprud. Ante-Justin. pag. 675. col. 1. init. Expendi etiam potest nova interpretatio, quæ legitur in *Actis Eruditorum Lipsiensibus*, ann. 1714. pag. 555. ubi vult Auctor Clar. WÄCHTERUS, *jus commentitium esse*, quod ex notione quadam communi oritur. *J. B.**

datur, pena pecunaria ab herede debetur, ut et ea quæ in conventionem deducta est. Jam enim nova accessit debendi causa.

<sup>7</sup> Vide L. 47. D. de Actionib. evit. et vend. Sed hæc est pena impropre dicta.

XX. And hence it follows that if, besides descrit, some new cause of obligation should arise, that which was a part of the punishment may become debt, though not as a punishment of the heir. Thus, after the sentence of a court, or after the decision of a lawsuit, to which events the power of a contract is given, the pecuniary penalty will be due from the heir, as also matters which were agreed to be so decided. For these events are a new cause of a debt being due.



## CAPUT XXII.

### DE CAUSIS INJUSTIS.

- I. *Explicatur discrimen inter causas justificas et suasorias.*
- II. *Bella, quae utroque causarum genere carent, ferina esse.*
- III. *Bella, quae suasorias causas habent, non justificas, esse prædonum.*
- IV. *Quasdam esse causas, quae falsam habeant justi speciem:*
- V. *Ut metum incertum:*
- VI. *Utilitatem sine necessitate:*
- VII. *Negatum matrimonium in magna foeminarum copia:*
- VIII. *Cupiditatem melioris soli:*
- IX. *Inventionem rerum occupatarum ab aliis.*
- X. *Quid si priores occupatores amentes sint?*
- XI. *Injustam causam esse et libertatis desiderium in populo subditio:*
- XII. *Et voluntatem regendi alios invito quasi ad ipsorum bonum.*
- XIII. *Item titulum universalis imperii quem quidam adscribunt Imperatori, qui refelliuntur:*
- XIV. *Alii Ecclesia, qui item refellitur.*
- XV. *Item voluntatem implundi vaticinia sine Dei mandato.*
- XVI. *Item id quod debetur non ex jure stricte dicto, sed aliunde.*
- XVII. *Distinctio belli cuius causa injusta, et ejus cui aliunde vitium accedit: et diversi utriusque effectus.*

Lib. II. 1.

I. 1 **D**IIXIMUS supra, cum de causis agere institueremus, causas alias esse justificas, alias suasorias. Polybius, qui id discrimen primus notavit, <sup>a</sup>illas vocat *προφάσεις*, quia

<sup>a</sup> *Illas vocat προφάσεις, quia palam proferri solent, (titulum dixit aliquoties Livius) has generis nomine αίτιας* Sic et Plutarchus distinguit in Galba, (pag. 1062 D.) et Dion in rebus Cæsaris et Pompei: [aut potius Xiphilin. p. 13. Ed. H. Steph.] et Polybius, ubi de Romanorum bello in Illyrios agit, excerpto legationum 125. Cum Suetonio recte illas *prætextum*, has *causas* dixeris. Ita enim ille de Julio Cæsare: *et prætextum quidem illi civilium armorum*

*hoc fuit: causas autem alias frivis operinantur, (cap. 30.) Thucydides alibi distinguit πρόφασιν et τὸ δληθὲν, (Lib. vi. c. 6): ut in Atheniensium motu adversus Siciliam, prætextum fuit opitulari Egestanis, res ipsa, cupiditas Sicilie sibi acquirendæ. Hermocrates in oratione de Atheniensibus loquens illud πρόφασιν prætextum vocat, hoc διδονιαν propositum. Utramque est in libro Thucydidis vi. [postremum in cap. 33. ubi tamen est δληθὲν, ut in priori διά-*

### CHAPTER XXII. Of unjust Causes of War.

I. 1 We have said above, when we began to treat of the causes of war, that some are justificatory or justifying, some suasive or

palam proferri solent, (titulum dixit aliquoties <sup>1</sup> Livius) has generis nomine *al̄t̄ias*.

2 Sic in bello Alexandri adversus Darium *πρόφασις* fuit ultio injuriarum quas Persæ Græcis intulerant, *al̄t̄ia* cupido gloriæ, imperii, divitiarum, cui accedebat spes magna facilitatis concepta ex Xenophontis et Agesilai expeditionibus. Sic *πρόφασις* belli Punici secundi controversia de Sagunto, causa indignatio Carthaginiensium, ob pactiones quas Romani iniquis temporibus ipsis expresserant, et aucti spiritus ex secundis per Hispaniam rebus; quæ Polybio notata. Similiter Thucydides belli Peloponnesiaci veram causam censem fuisse vires Atheniensium augescentes et Lacedæmoniis suspectas, obtentum vero controversiam Corcyrenium, Potideensium, et alia; <sup>Lib. III. 6, 7, 8.  
Lib. I. 23, 26.  
88.</sup> <sup>b</sup> ubi

*νοτα*, quæ Auctor heic permutavit.] Appianus etiam *προφάσεων* vocem usurpat in Mithridatico, (pag. 209.) Idem civium v. ubi de rupta pace inter Octavium et Sextum Pompeium agit, dicit *al̄t̄ias* causas alias intus fuisse, alias quæ preferebantur, (pag. 716. Ed. II. Steph.) Agathias libro quinto id quod alii *πρόφασιν*, vocat *σκῆψιν και προκαλυμμα*, pigmentum et obtentum; cui opponit *al̄t̄ias* in historiæ Hunni Zaberganis. (cap. 5.) Adde quæ diximus supra libri hujus capite i. § 1. Procopius *Persicorum* II. dicit, statum esse non libere loqui ubi dux est justitia, comes utilitas (cap. 15.)

<sup>1</sup> Exempli gratia, Lib. xxxvii. cap. 54. num. 13. J. B.

<sup>b</sup> *Ubi tamen ille al̄t̄ias et προφάσεων nomina permisit?* Sic et libro v. (c. 53) de Argivis contra Epidaurios agens, quam prius vocaverat *πρόφασιν*, mox vocat *al̄t̄ias*, quomodo et Græcum *ἀρχῶν*, Latinum *principiorum* vocem, aliasque ejus generis, esse sensus ambiguus notavimus d. cap. i. § 1. hujus libri. Scriptores Constantinopolitani Imperii id quod alii *πρόφασιν* sive *πάτροκλον* vocant, nimurum ex Achillis historia, qui ad resumenda arma ex Patroclio sumpsat materiam. [De hoc vide MEURSIUM, *Gloss. Græco-Barbar.* pag. 415. SALMASIUM, in *Achill. Tatium*, pag. 581. DUROFT. *Gnomolog. Homeric.* pag. 112.]

impelling. Polybius, who first noted this difference, calls the former *pretexts*, the latter, *causes*; Livy sometimes calls the former *titulus*\*.

2 Thus in the war of Alexander against Darius, the *pretext* was revenge for the injuries which the Persians had done to the Greeks; the *cause* was the desire of glory, empire, wealth, added to a great hope of the facility of the conquest, proved from the expeditions of Xenophon and Agesilaus. So the *pretext* of the second Punic war was the controversy concerning Saguntum, the *cause* was the indignation of the Carthaginians excited by the terms which the Romans had imposed upon them in their evil times, and their courage exalted by their successes in Spain; as Polybius notes. In the same way Thucydides judges that the true cause of the Peloponnesian war was the strength of the Athenians, increasing and drawing the suspicion

\* For example, Lib. xxxvii. c. 54. num. 13. J. B.

tamen ille *αἰτίας* et *προφάσεως* nomina permiscat. Est idem  
 Liv. vii. 30. discriminē in oratione Campanorum ad Romanos, cum adversus  
 Samnites pugnasse se aiunt verbo pro Sidicinis, re pro seipsis:  
 Lib. xxxvi. 6. quod viderent ubi conflagrassent Sidicini ad se trajecturum  
 esse incendium. Antiochum <sup>2</sup>quoque Livius memorat in Romanos  
 Phll. ii. 22. bella suscepisse, in speciem causas habentem Barcillæ  
 necem et alia quædam, revera quod ex labente Romanorum  
 disciplina spem magnam concepisset. Sic Plutarchus notat  
 non ex vero objectum Antonio a Cicerone, quod causa esset  
 belli civilis, cum Cæsar bellandi certus <sup>3</sup>prætextum tantum ab  
 Antonio cepisset.

II. Sunt qui neutro causarum genere feruntur in bella,  
<sup>4</sup>periculorum, <sup>5</sup>ut Tacitus loquitur, propter ipsa avidi. Horum  
 vitium humanum excedit modum, θηριότητα Aristoteles vocat.  
 De his Seneca: *possum dicere non esse hanc crudelitatem,*  
<sup>6</sup>*sed feritatem, cui voluptati savitia est: possumus insaniam*  
*vocare: nam varia sunt genera ejus, et nullum certius quam*

*Ethic. Nic.*  
 vii. 1.  
 Lib. ii. de  
 Clem. c. 4.

<sup>2</sup>Auctor, dum festinans legeret, et  
 ad verborum constructionem non adten-  
 deret, Antiocho tribuit quod de Boëtis  
 dicit LIVIUS: *In Boëtiā ipse [Antio-  
 chus] profectus est; causas in speciem*  
*iræ adversus Romanos eas, quas ante*  
*dixi HABENTEM: Brachyllæ necem, &c.*  
 Eundem errorem, sine dubio hinc haus-  
 tum, errat BOECLERUS, *Dissert. de Cla-  
 rigatione*, Tom. ii. pag. 1212. J. B.

<sup>3</sup>*Prætextum tantum ab Antonio ce-  
 pisset]* Ταῦτα πάλαι δεομένῳ προφά-

*σεως σχῆμα καὶ λόγου εὑπρεπῆ τοῦ*  
*πολέμου πάρεσχεν. hæc pridem pre-  
 textū opus habenti speciem aliquam et*  
*decorum titulum bellandi dedere. Verba*  
*sunt in hac historia Plutarchi, (Vit. M.*  
*Antonii, p. 918 c. d.) Lucani autem,*  
*(Pharsal. i. 263, &c.)*

Cunctaque pudoris  
 Rumpunt fata moras. Justos fortuna laborat  
 Ræsi duci motu, et causa inventu armis.

<sup>4</sup>Periculorum, ut Tacitus loquitur,  
 propter ipsa avidi] De Alanis Ammi-

of the Lacedæmonians; the pretext, the controversy of the Corey-  
 reans, of the Potideans, and other things: where however he uses  
 the terms *pretext* and *cause* (*πρόφασις* and *αἰτία*) indiscriminately. [See  
 Lib. v. c. 53. Gron.] The same distinction occurs in the oration of  
 the Campanians to the Romans, when they say that they fought  
 against the Samnites, nominally for the Sidicini, really, for them-  
 selves; because they saw that when the Sidicini were consumed, the  
 conflagration would spread to them. So Livy says that Antiochus  
 made war upon the Romans, having, as a pretence, the death of  
 Barcillas, and other matters, but really, because he had conceived  
 great hope from the relaxed discipline of the Romans. So Plutarch  
 notes that it was not truly objected to Antony by Cicero that he was  
 the cause of the civil war; since Caesar was already resolved upon  
 war, and only took his pretext from Antony.

*quod in cœdes hominum et laniationes pervenit.* Cui sententia perquam similis est illa Aristotelis ultimo *Nicomachiorum*: <sup>Cap. 7.</sup>

δόξαι γὰρ ἀν παντελῶς μαίφονός τις εἶναι, εἰ τοὺς φίλους πολεμίους ποιοῖτο, ἵνα μάχαι καὶ φόνος γίγνοντο· omnino enim crudelis habendus sit, qui ex amicis hostes faciat pugnandi et fundendi sanguinis cupiditate. Dion Prusseensis:

τὸ δὲ καὶ χωρὶς ὑποθέσεως πολεμεῖν καὶ μάχεσθαι, τί ἄλλο <sup>Orat. xxxvii.  
p. 473 B.</sup>

ἢ μανία παντελῆς ἐστι, καὶ διὰ ταύτην κακῶν ἐπιθυμία; nam sine causa in bella ac pugnas ferri, mera est insania malum sibi querens. Idem illo Seneca epistola xiv: nemo ad humum sanguinem propter ipsum venit, aut admodum pauci.

III. 1 Plerique vero bellantium causas suasorias habent, aut sine justificis aut cum justificis. Sunt qui justificas plane non curant, de quibus dici potest illud a Romanis juris-consultis est proditum, prædonem esse eum, 'qui rogatus de possidendi causa, nullam aliam adfert nisi quod possideat. Aristoteles de belli suasoribus; ὡς οὐκ ἄδικον τοὺς ἀστυγεί-<sup>1</sup> Rhet. 3.

anus libro xxxi.<sup>2</sup> Ut hominibus quietis et placidis otium est voluptabile, ita illus pericula juvant et bella. (Cap. 2. p. 672. Edit. Gron. Vales.)

<sup>3</sup> Dicit equidem TACITUS Hist. III. 41. et v. 19. *periculorum avidi*: Sed illud propter ipsa deest. Alibi: *Non tam præmiis periculorum, quam ipsis periculis latet.* Hist. II. 86. Propius SENeca: *Periclitamus periculi causa.* Quæst. Nat. v. 18. J. B.

\* Sed feritatem] Idem libro II. de

Ira c. 5. de Apollodoro loontus et Phalaride: *haec non est ira, feritas est.*

<sup>4</sup> Qui rogatus de possidendi causa, nullam aliam adfert nisi quod possideat] L. pro hærede. II. § ultimo et sequentibus legibus, D. de hæreditatis petitione. Talis Herulorum in Langobardos πόλεμος ἀπροφάσιστος, bellum sine prætextu. [Apud PROCOPIUM, Gotth. II. 14.] Galli apud Livium v. in armis se jus ferre, et omnia fortium virorum esse. (Cap. 36.)

II. Some there are who rush into war not actuated by either of these kinds of cause, being, as Tacitus says, greedy of danger for its own sake\*. These men are of a temper which does not lie within the proper limits of humanity, of a ferine nature. So Seneca, *On Clemency*, says, it is not mere cruelty but a ferine disposition, which delights in human blood and butchery. So Aristotle says that that is a sanguinary character, which makes a man break with his friends for the sake of fighting and shedding blood; and Dio Prusseensis says it is mere madness. So Seneca, Epist. XIV.

III. 1 However, most parties, when they go to war, have impelling causes, either with or without justifying causes. There are some who frankly do not trouble themselves about justificatory causes; to

\* As Barbeyrac shews, Grotius has put together two phrases of Tacitus: *Periculorum avidi*, *Hist.* III. 41, and v. 19; and *Non tam præmiis periculorum, quam ipsis periculis latet*, *Hist.* II. 86.

*τονας καταδουλοῦσθαι, καὶ τὸν μηδὲν ἀδικοῦντας πολλάκις οὐδὲν φροντίζουσι; qui justum sit vicinos innoxios in servitatem redigere, et eos qui nullam faciunt injuriam, saepe nihil curant?*

Liv. v. 36. 2 Talis Brennus, qui omnia dicebat esse validiorum.

*De Bell. Punic. xi. v. 183.* Talis Silio Annibal, cui

Pro federe proque

Justitia est enas.

*Sen. Herc. Fur. v. 407.* Talis Attila, et quibus illud in ore est:

Quæritur belli exitus,

Non causa.

Luc. vii. 260. Et:

Hæc acies victum factura nocentum est:

*Tacit. Ann. xv. 1.* Et:

Id in summa fortuna æquius quod validius.

*Lib. IV. de Civ. Def. 6.* Nec male his aptes illud Augustini: *inferre bella finitimiſ, et inde in cetera procedere, ac populos sibi non molestos sola regni cupiditate conterere ac subdere, quid aliud quam grande latrocinium nominandum est?* De talibus bellis

*ε Immanitatis omnem humanitatem repellentis] Agathias libro II. ὅτι δὲ κέρδους ἔκατι ἡ δυσμενεία ἀλόγου, μηδὲν ἄγκλημα ἐνδικού ὁχοντες, ἐπειτα φοιτῶσιν ἀνὰ τὴν ὁθνέλαν τὸν μηδὲν ἡδικηστας σινόμενοι, οὗτοι δὲ αλάζονέ εἰσι καὶ ἀτοσθαλοι· qui vero aut lucri causa, aut caco odio, nullam habentes justam querelam, alienas terras invadunt innoxii nosii, hi homines sunt et superbi et improbi. (Cap. 1.) Exemplum nobis dat illustre Menander*

Protector: ὅτι Βαιάνος δ τῶν Ἀβάρων σχάγανος οὐδεμιᾶς ἀφορμῆς ἢ σκήψεως λαβόμενος, οὐδὲ ψευδῆ γοῦν κατὰ Ψωμαίων αἰτιαν δέξιαστας τινὰ συνθῖναι, ἀναισχυντώτατα καὶ βαρβαρικώτατα παρέλυσε τὰ συνθήκας· *Baianus Avarorum chaganus, nulla occasione aut obtentu, ne conatus quidem causam vel falsam contra Romanos comminisci, inverecunde plane, barbarum in morem exuit pacta.* (Cap. 21.)

*β Quales sunt tyranni] Bene Philo*

whom we may apply the maxim of the Roman jurists, that he who, when he is asked by what claim he possesses a thing, can assign no other than that he does possess it, is a robber. Aristotle speaks of those who give no care to the question whether it is just to enslave unoffending neighbours.

2 Such a man was Brennus, who said that everything belonged to the stronger: such is Annibal in Silius, whose sword is the measure of right and justice: such Attila; and those who say, as in Seneca, Our thought the fortune not the cause of war; or as in Lucan, This day will make the conquered part the guilty; or as in Tacitus, In the highest fortune what is strongest is most just. Yet as Augustine says, To make war on unoffending neighbours and to harass and subjugate them out of mere love of honour, what name does it deserve, except

Velleius: *bella non causis inita, sed prout eorum merces fuit.* Apud Ciceronem legimus de *Officiis* primo: *ea animi elatio, quæ cernitur in periculis et laboribus, si justitia vacat, non modo virtutis non est, sed potius immanitatis omnem humanitatem repellentis.* Andronicus Rhodius: *οἱ μεγάλων ἔνεκα κερδῶν λαμβάνοντες ὅθεν οὐ δέι, πονηροὶ καὶ ἀσεβεῖς καὶ ἄδικοι καλοῦνται οἱοί εἰσιν οἱ τύραννοι, καὶ οἱ τὰς πόλεις πορθοῦντες qui magni compendii sui causa accipiunt unde non oportet, hi pravi, impii, injusti appellantur, b' quales sunt tyranni et urbium vastatores.*

IV. Alii causas quasi justificas adferunt, quæ expensæ ad rectam rationem injustas reperiuntur: et, ut Livius loquitur, non certamen juris, sed vim quæri appetet. Reges plerosque, ait Plutarchus, duobus nominibus, pacis et belli, tanquam nummis uti, non ad id quod justum est, sed ad id quod expediet. Quæ autem sint causee injustæ, cognosci aliquatenus potest ex justis causis quas hactenus explicavimus. Rectum enim obliqui est index. Sed perspicuitatis causa summa genera annotabimus.

*in Decalogram: ὅσοι τοίνυν τῶν κλεπτῶν λεχὸν προσέλαβον, ὅλας συλῶσι πόλεις, ἀλογοῦντες τιμωριῶν, διὰ τὸ ἐπικυδέστεροι τῶν νόμων εἶναι δοκεῖν· οὗτοι δέ εἰσιν οἱ ὀλγαρχικοὶ τὰς φύσεις, οἱ τυραννίδος καὶ δυναστειῶν ἀποθυμοῦντες, οἱ τὰς μεγάλας ἤργαζόμενοι κλοπάς, σεμνοῖς ὀνόμασι τῆς ἀρχῆς καὶ ἡγεμονίας ἐπικρύπτοντες ληστεῖαν τ' ἀληθέστερον qui vero furum vires nacti sunt, hi totas prædantur urbes,*

*penarum securi, quod supra leges eminere videantur. Tales sunt homines ingenio minime civili, dominatum et potentatus avidi, magna furia committentes, qui pulchris nominibus magistratum et imperiorum id obtengunt quod verius latrocinium appelletur. (Pag. 763 C. D.) Optime convenientur haec cum iis quæ ex Curtio, Justino, Seneca et Augustino producta sunt ad dictum cap. 1, § 1. libri hujus.*

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*that of a huge robbery? Of such wars, Velleius says they are wars not entered into for justice, but for gain. So Cicero says that Courage without justice not only is not a part of virtue, but is an inhuman extravagance. And Andronicus Rhodius speaks to the same effect.*

IV. Other parties, in going to war, allege justificatory causes, which, when brought to the standard of right reason, turn out unjust; and then it appears, as Livy says, that what is aimed at is, not a trial of right, but of strength. Most kings, says Plutarch, use the two names, *peace* and *war*, only as coins, to procure, not what is just, but what is expedient. What are unjust causes, may be known in some measure from the just causes which we have been explaining: the straight line is the index of what is oblique. But for the sake of perspicuity we shall make some general remarks.

V. 1 Metum ergo ex vicina potentia non sufficere supra diximus. Ut enim justa sit defensio, necessariam esse oportet, qualis non est nisi constet, non tantum de potentia, sed et de animo, et quidem ita constet, ut certum id sit ea certitudine quæ in morali materia locum habet.

2 Quare minime est probanda eorum sententia, qui justam belli causam statuant, si vicinus nulla pactione impeditus in suo arcem faciat, aut munitionem aliam quæ damnum aliquando dare possit. Nam adversus tales metus contrariae in suo munitiones et siqua sunt similia remedia querenda sunt, non vis Zonar. ix. 15. Pausan. i. 10. Germ. c. 35. bellica. Injusta igitur bella Romanorum in Philippum Mace-

BIBLIOGRAPHY, LIB. II. CAP. 6. N. 1. EXEMPLUM HUC NON FACIT, QVM SECUNDUM ISTUM, EX PACTO PETERET IOLEM HERCULES: VIO-

V. 1 That fear from a neighbouring power is not a sufficient cause, we have said above. For, that defense may be just, it must be necessary; and it cannot be this, except there be clear evidence, not only of the power, but of the *animus* of the party; and such evidence as amounts to moral certainty.

2 Hence we can by no means approve the opinion of those who hold it to be a just cause of war, if a neighbour, being prevented therefrom by no pact, establish a fortress on his own ground, or any other munition of war, which may possibly at some time be mischievous to us. For the proper remedies against such fears are opposing munitions, and the like, not force of arms. Therefore unjust were the wars of the Romans against Philip of Macedon, and of Lysimachus against Demetrius, except there were some other reason. I am much pleased with what Tacitus says of the Chauci: *The most noble people among the Germans, and a people that prefers to secure its greatness by its justice; not greedy, not passionate, but quiet and retired. They provoke no wars, they practise no robbery or plunder of their neighbours; and the great proof of their virtue and their strength is, that it is not by wrong-doing that they preserve their superiority. Yet they can promptly use arms, and if need be, raise armies: they are numerous in infantry and cavalry, and retain their*

*tamen omnibus arma, ac, si res poscat, exercitus: plurimum virorum equorumque, et quiescentibus eadem fama.*

VI. Nec utilitas par jus facit cum necessitate.

VII. Ita ubi laxa est matrimoniorum copia, negatum aliquod matrimonium causam bello præbere non potest: qualem <sup>4</sup> olim Hercules arripuit in Eurytum, <sup>1</sup>Darius in <sup>5</sup>Scytha.

VIII. Nec magis mutandæ sedis amor, ut paludibus et solitudinibus relictis solum fecundius possideatur: quam Germanis veteribus bellandi causam fuisse ait Tacitus.

*Hist. iv. 73.*

IX. Æque est improbum, inventionis titulo sibi vindicare ea quæ ab alio tenentur, etiamsi is qui tenet sit improbus, de <sup>Vict. de Ind.</sup> <sup>Rer. I. n. 31.</sup> Deo male sentiens, aut hebetis ingenii. Nam inventio est eorum quæ nullius sunt.

X. 1 Neque ad dominium requiritur aut virtus moralis, aut religiosa, aut intellectus perfectio: nisi quod hoc videtur posse defendi, siqui sint populi omnino destituti a rationis usu, <sup>Vict. de Bello,</sup> <sup>n. 5, 6, 7, 8.</sup> eos dominium non habere, sed ex caritate tantum iis deberi quæ ad vitam sunt necessaria. Nam quæ alibi diximus de

*Id. II. n. 18.*

latio autem fidei datæ justam bello gem: vide Xiphilinum (pag. 356 c.) caussam præbet. *J. B.* *Ed. H. Steph.*

<sup>1</sup> *Darius in Scytha*] Antoninus Caracalla in Artabanum Parthorum re- <sup>5</sup> Vide JUSTINUM, Lib. II. cap. 5. n. 9. *J. B.*

*reputation even in inaction.*

VI. Nor does utility generate a right, in the way in which necessity does.

VII. Thus when there is no want of opportunity of marriage, any marriage denied cannot supply a cause for war; though Hercules formerly took occasion to make war on Eurytus on such grounds, and Darius on the Scythians.

VIII. Neither is the desire of migrating from one place to another a just ground of war; that a nation leaving marshes and deserts, may become possessed of a more fertile soil; which Tacitus mentions as the reason of making war among the old Germans.

IX. It is no less unjust to claim lands on the ground of having discovered them, when they are occupied by another, even though the possessors be bad men, with wrong notions of God, and dull intellects. For those lands only can be discovered which belong to nobody.

X. 1 Nor is there required for ownership [to exclude such claim] either moral virtue, or religion, or perfection of intellect: except that this may, it would seem, be defended; that if there be any people altogether destitute of the use of reason, such may not have ownership, but out of charity those things ought to be given them

sustentatione dominii, quam pro infantibus et amentibus facit jus gentium, ad eos populos pertinet cum quibus est pactorum commercium: tales autem non sunt populi siqui reperiuntur toti amentes, de quo merito dubito.

2 Male ergo Græci Barbaros ob morum diversitatem, forte et quod ingenio cedere viderentur, hostes sibi quasi naturaliter

*Plato, de Rep.*

v. p. 470 c.

*Arist. Pol. i.*

9.

*Eurip. Iphig.*

in Aul. v.

1400, et seqq.

Liv. xxxi. 29.

Isoct. Panath.

p. 267 n.

Hoc libro c.

20. § 40.

dicebant. Quatenus autem ob peccata gravia et naturam aut societatem humanam impugnantia, auferri dominium possit, alia est quæstio, et modo, cum de pœnarum jure ageremus, nobis tractata.

XI. Sed <sup>k</sup> nec libertas, sive singulorum sive civitatum, id est, *αὐτονομία*, quasi naturaliter, et semper quibusvis competit, jus bello præstare potest. Nam libertas cum natura competere hominibus aut populis dicitur, id intelligendum est de jure naturæ præcedente factum omne humanum, et de libertate *κατὰ στέρησιν*, non de ea quæ est *κατ' ἐναντιότητα*, hoc est, ut natura quis servus non sit, non ut jus habeat ne unquam serviat: nam hoc sensu nemo liber est: quo pertinet illud Albutii: *neminem natum liberum esse, neminem servum; hæc postea*

*Senec. iii.*  
contr. 21.

<sup>k</sup> *Nec libertas sive singulorum sive civitatum, id est, αὐτονομία, quasi naturaliter et semper quibusvis competit, jus bello præstare potest]* Vide concilium iv. Toletanum, et quæ nos supra cap. iv. hujus Lib. § 14.

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only which are necessary to life. For what we have said above, concerning the sustentation of ownership, which the law of nations performs for infants, and persons out of their mind, pertains to those peoples with whom others have an intercourse of pacts; and if there be any people altogether irrational, they are not such: but I much doubt the fact.

2 Therefore it was unjust on the part of the Greeks to say, that the Barbarians were their natural enemies, merely on account of the diversity of manners, or because they seemed to be inferior in intellect. How far dominion may be taken away from a people on account of grave offenses, impugning nature or human society, is another question, and must soon be treated by us, when we speak of the right of punishing.

XI. Nor again can we say of the liberty, either of individuals, or of cities, or states, (that is, *autonomy* or self-government,) that it is either by natural law, and at all times, an attribute of all, or that in the cases in which it is, it furnishes just ground for war. For when we say that liberty by nature belongs to men or to peoples, we are to understand that, of a natural right preceding all human pacts; and of liberty by negation of slavery, not of liberty in opposition to slavery;

*nomina singulis imposuisse fortunam.* Et Aristotelis illud : <sup>1. Polit. c. 3.</sup> νόμῳ τὸν μὲν δοῦλον εἶναι, τὸν δὲ ἐλεύθερον εἰς τὴν νόμῳ νομίμην γένεσιν. Quare qui legitima causa in servitutem sive personalem sive civilem devenerunt, contenti sua conditione esse debent, ut et Paulus Apostolus docet: <sup>1 Cor. vii. 21.</sup> δοῦλος ἐκλήθης; μή σοι μελέτω· vocatus es ad servitutem? ne id te torqueat.

XII. Neque minus iniquum armis subigere aliquos velle, quasi dignos qui serviant, quos naturaliter servos interdum philosophi vocant. Non enim siquid alicui est utile, id statim mihi licet ei per vim imponere. Nam his qui rationis habent usum libera esse debet utilium et inutilium electio, nisi aliori jus quoddam in eos quæsitum sit. Infantium plane alia est <sup>Vict. de Ind. n. 24.</sup> ratio, quorum regimen, cum ipsi jus exercendæ αὐτοπραγias actionumque suarum moderandarum non habeant, occupanti et idoneo natura concedit.

XIII. 1 Vix adderem stultum esse titulum, quem quidam tribuunt Imperatori Romano, quasi ipse etiam in remotissimos et incognitos hactenus populos jus imperandi habeat, <sup>Aysala de Jur. Bartol. 2. n. 29. Covarr. c. pccatuum. p. 2. § 9. n. 8. et seqq.</sup>

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so that man is not a slave by nature, but he is not by nature a creature that cannot be a slave. For in this latter sense, no one is free. And to this view pertains what is said by Albutius, that *No one is born free, and no one is born a slave*; these names came afterwards to belong to men by their fortune. So Aristotle says, that it is a result of law that one man is free, another a slave. Therefore they who have, by a legitimate course, come into slavery, either personal or civil, ought to be content with their condition; as St Paul teaches, *Art thou called being a servant? Care not for it.*

<sup>1 Cor. vii. 21.</sup>

XII. Nor is it less unjust to wish to subjugate any by arms, as being worthy to be slaves, or as philosophers sometimes speak, naturally slaves. For even if there be anything which is fit for me, it does not follow that any one has a right to impose it on me by force. For those who have the use of reason, ought to have a free election left them of what is useful to them and what is not, except another have a right over them. The case is plainly different with infants, the government of whom, since they themselves have not the right of independent action and self-direction, nature gives to those who have a claim to it, and can exercise it.

XIII. 1 It would hardly be necessary to notice that the title given by some to the Roman Emperor is absurd, as if he had the right of ruling over the most remote and hitherto unknown peoples; except Bartolus, who was long held the prince of jurists, had ventured

*nisi juris consultorum diu princeps habitus Bartolus haereticum ausus esset pronuntiare qui id negat; nimurum quia et Imperator interdum se <sup>1</sup>mundi dominum vocet, et in Sacris literis imperium illud, quod <sup>2</sup>Romaniam posteriores scriptores vocant, appelleatur <sup>3</sup>τῆς οἰκουμένης nomine: qualia sunt et illa:*

Petron. c. 119.

Orbem jam totum victor Romanus habebat,

*multaque similia per complexionem, aut excessum, aut excellentiam dicta: quippe cum et in iisdem sacris literis sola <sup>4</sup>Judæa sæpe venit nomine τῆς οἰκουμένης: quo sensu accipiendum dictum vetus Judæorum, medio telluris sitam urbem Hierosolyma, <sup>5</sup>id est in medio Judææ, sicut in medio Græciae Delphi similiter dicti orbis umbilicus. Neque est quod quemquam De Monarch. moveant Dantis argumenta, quibus probare nititur Imperatori Luc. ii. 1. jus tale competere, quia id humano generi expedit. Nam Arist. vil. commoda quæ adfert, suis compensantur incommodis. Ut Pol. 4.*

<sup>1</sup> *Mundi Dominum vocet] Ut in concilio Chalcedonensi actione xi. et xii.*

<sup>2</sup> *Romaniam posteriores scriptores vocant] Ut et Athanasius ad Solitarios (Tom. i. pag. 832.) Id vix sexta pars erat mundi tunc cogniti.*

<sup>3</sup> *Τῆς οἰκουμένης nomine] Philo de Legatione: τῶν πλειστων καὶ ἀναγκαιοτάτων μερῶν τῆς οἰκουμένης, ἡ δῆ καὶ κυρίως ἡ τις οἰκουμένην εἶποι, δυστικῶσις ὁρίζομένην Εὐφράτη τε καὶ*

*Πήνην<sup>6</sup> de pluribus utilissimisque orbis*

*partibus loquor, quas et eminenter aliquis orbem appellat, definitum amnis duobus Euphrate et Rheno. (Pag. 993 d. e.)*

<sup>6</sup> *Judæa sæpe venial nomine τῆς οἰκουμένης] Hieronymus: nomen terræ, etiam cum additur particula omnis, restringi debet ad eam regionem, de qua sermo est. [Vide Palestinam. Eruditissimi RELANDI, nuper cum summo Reip. literariorum damno his terris erepti, Lib. i. cap. 5. ubi et testimonia Vete-*

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to pronounce every one a heretic who denies it; namely, because he sometimes calls himself the Lord of the World; and also, because in scripture, the empire is called the empire of the whole inhabited earth, an *œcumene* empire, according to the Greek word; *Romania* in some later writers. And so Petronius speaks of the victor Roman having *orbem totum*, the whole globe. And many the like things are said, when we use comprehensive, or excessive, or emphatic expressions: as when in the same scripture, Judæa is called *the inhabited earth*: in which sense we are to understand the saying of the old Jews, that Jerusalem is in the middle of the earth, that is, in the midst of Judæa; as Delphi was called the navel of the world. Nor should any one be moved by the argument of Dante, in which he tries to prove that such a right belongs to the emperor, because it is for the advantage of the human race. For the advantages which he adduces are outbalanced by disadvantages. For as a ship may be so large that it cannot be steered, so

enim navis aliqua ad eam magnitudinem pervenire potest quæ regi nequeat, sic et hominum numerus et locorum dis-tantia tanta esse, ut unum regimen non ferat.

2 Deinde vero concesso hoc expedire, jus imperii non sequitur, ut quod nisi ex consensu aut pena nasci nequit. Ne in omnia quidem, quæ olim fuere populi Romani, Imperator Romanus jus nunc habet: multa enim ut bello quæsita ita bello amissa sunt; alia pactionibus, alia derelictione <sup>q</sup>in aliarum gentium aut regum jus transierunt. Quædam etiam civitates olim plane subditæ, postea tantum ex parte subditæ, aut tantum inæqualiter federatæ esse cooperunt. Nam omnes hi modi aut amittendi, aut mutandi juris, non minus adversus Rom. Imperatorem, quam adversus alios valent.

XIV. 1 Sed et Ecclesiae jus fuerunt qui adsererent etiam in <sup>6</sup>populos ignotæ hactenus partis terrarum, cum tamen ipse Paulus apostolus aperte dixerit eos qui extra

rum referuntur de *Hierosolyma* in medio Terræ sita. J. B.]

<sup>o</sup> *Id est in medio Iudeæ]* Discas hoc ex Josephi Lib. III. *Belli Judaici* (cap. 3. § 5. divis. *Hudson.*)

<sup>q</sup> *In aliarum gentium aut regum jus transierunt]* Exemplum sume in Hispania, de qua vide *Gomezium* in § fuerat: num. 5. de *Actionibus*. Panormitanum in c. *venerabilem* col. 9. de *Electione*. Jasonem in l. *cunctos populos*, i.

col. 2. Cod. de *summa Trinitate*. Menochium cons. 11, num. 102. Cardinalem Tuschum practicarum conclusionum 345. § rex Hispanie. Molinæum in cons. Paris. in pr. num. 20. Chassaneum de gloria Mundi parte v. consid. 28. Azorium *Institutionum Moralium* Lib. II. c. 5. p. 2.

<sup>6</sup> Confer heic opus Auctoris nostri *De Imperio Summarum Potestatum circa Sacra*, cap. iv. J. B.

the number of subjects and the distance of places may be so great that they cannot subsist under one government.

2 But even if we grant that such a government is expedient, there does not follow any right of empire, for that can arise only from consent or from punishment. The Roman emperor has not now any right over even all those places which were formerly under the Roman people; for many of these, as they were won by war, so have they been lost by war; some have passed by compacts, and some by dereliction, under the authority of other nations or kings. Again, some cities, formerly entirely subject, have since become subject in part only, or have become merely federate parts of the empire. For all these ways either of losing, or of changing the rights of rulers, are valid against the Roman Emperor, as against any other party.

XIV. 1 There have also been persons who have asserted the right of the Church, even over the peoples who occupy the hitherto unknown parts of the earth. And yet St Paul plainly says, that he does not

<sup>silv. Verb.  
Bell. p. I. n.  
21.  
Covarr. loco  
citat. n. 9.</sup>

<sup>Vict. de Ind.  
Rel. 21, et seq.  
Ayala, I. 2.  
n. 29.</sup>

Christianismum sunt, judicandi sibi jus non esse: *τι γάρ μοι τοὺς ἔξω κρίνειν*; 1 Cor. v. 12. Et quod jus Apostolis judicandi competiit, quanquam etiam ad res terrenas suo modo pertinebat, erat tamen cœlestis, ut ita dicam, non terrestris ingenii, exercendum scilicet non per arma et flagra, sed per verbum Dei generaliter propositum et ad circumstantias peculiares aptatum, per sigillorum divinæ gratiæ exhibitionem aut negationem, prout cuique conduceret: postremo loco etiam per vindictam non naturalem sed natura ipsa superiorum, ac proinde a Deo procedentem: qualis in Anania, Elyma, Hymenæo, et aliis apparuit.

2 Christus ipse, a quo omnis potestas Ecclesiastica fluxit, et cujus vita exemplar est Ecclesiæ, qua talis est, propositum, negavit regnum suum esse de hoc mundo, hoc est, ejus naturæ cujus sunt cetera regna: addens, alioqui futurum fuisse ut more aliorum regum opera militum uteretur. Nunc vero etiamsi legiones voluisset poscere, poposcisset, non hominum, sed Angelorum. Matth. xxvi. 53. Et quicquid fecit pro jure sue potestatis, id fecit non humana sed divina vir-

Joh. xviii. 36.  
Vid. Petr.  
Dam. l. ii.  
epist. 9. et  
Bern. epist.  
921.

<sup>1</sup> *Signum medendi*] Bene hoc expli-  
cat Abulensis ad Matth. ix.

<sup>2</sup> *Non impedio dominationem vestram in hoc mundo*] Hilarius Arelatensis:  
non enim ad hoc venerat Christus ut alienam invaderet gloriam, sed ut suam donaret: non ut regnum terrestre præriperet, sed ut cœleste conferret.

<sup>3</sup> *Dixit Chrysostomus*] Verba ejus sunt de sacerdotio libro II. (Tom. vi.

pag. 90. Edit. Savil.) μᾶλιστα μὲν οὐν τοῖς χριστιανοῖς οὐκ ἀφέται πρὸς βίᾳν ἐπανορθοῦν τὰ τῶν ἀμαρτανόντων πτασματα· ἀλλ' οἱ μὲν ἔξωθεν δικασταὶ τοὺς κακούργους, δταὶ ὑπὸ τοῖς νόμοις λαβωσι, τολλήν ἐπιδείκνυται τὴν ἔξουσίαν, καὶ ἀκοντας τοῖς τρόποις κωλύοντοι χρῆσθαι τοῖς αὐτῶν. ἐνταῦθα δὲ οὐ βιοζόμενον, ἀλλὰ πείθοντα δεῖ ποιεῖν αμείνω τὸν τοιούτον· οὗτε γάρ

judge those who are outside the boundary of Christianity. *What have I to do to judge them that are without?* 1 Cor. v. 12. And the right of judging which pertained to the Apostles, though in its own way it pertained to the things of earth, yet was, as I may say, of a heavenly not of an earthly character; it was to be exercised, not by arms or by scourges, but by the word of God generally set forth, and adapted to peculiar circumstances; by the exhibition or denial of the seals of divine grace [communion and excommunication, G.] according to each one's case: and in short, by a mode of punishment not natural, but super-national, and proceeding from God; as appeared in the cases of Ananias, Elymas, Hymenæus, and others.

2 Christ himself, from whom all Ecclesiastical power flowed, and whose life is proposed as the pattern of the Church, so far as it is the Church of Christ, said that his kingdom was not of this world; that is, of

tute, etiam tum cum nundinatores e templo ejecit. Flagrum enim tum quoque divinæ iræ erat signum, non instrumentum; ut alias sputum et oleum <sup>signum</sup> medendi, non remedium. Augustinus ad indicatum Johannis locum: *Audite ergo Judæi* <sup>Tract. cxxv.</sup>  
<sup>num. 2.</sup> *et gentes: audi circumcisio: audi præputium: audite omnia regna terrena: non impedio dominationem vestram in hoc mundo: regnum meum non est de hoc mundo. Nolite metuere metu vanissimo, quo Herodes ille major, cum Christus natus nuntiaretur, expavit, et tot infantes, ut ad eum mors perveniret, occidit, timendo magis quam irascendo crudelior. Regnum, inquit, meum non est de hoc mundo. Quid vultis amplius? venite ad regnum quod non est de hoc mundo: venite credendo, et nolite sævire metuendo.*

3 Episcopo inter cetera interdicit Paulus ne percussor sit, 1 Tim. iii. 2, ἀνάγκη κρατεῖν, imperare imposita necessitate, ea scilicet quæ ex humana vi proficiscitur, regum esse, non episcoporum, <sup>t</sup>dixit Chrysostomus. Et alibi: *non est ac. Ap. Tom.*  
*nobis data potestas ut auctoritate sententiae* (talis scilicet <sup>IV. p. 688</sup>  
<sup>hom. ill. ep.</sup>  
<sup>ad Tit. (p.</sup>  
<sup>388.) hom. L</sup>  
<sup>ep. I. ad</sup>  
<sup>Theos. hom.</sup>  
<sup>ii. pp. 168,</sup>  
<sup>169. de sacer.</sup>  
<sup>Liber. II.</sup>)

ημῖν ἔξουσία τοιαύτη παρὰ τῶν νόμων δέδοται πρὸς τὸ κωλύειν τὸν ἀμαρτάνοντας. οὗτε, εἰ καὶ ἐδέδοτο, εἴχομεν ὅπου καὶ χρηστώμεθα τὴν δυνάμει, οὐ τοὺς ἀνάγκη τῆς κακίας, ἀλλὰ τὸν προαιρέστη ταύτης ἀπεχομένου στεφανοῦντος τοῦ Θεοῦ διὰ τοῦτο πολλῆς χρεία τῆς μηχανῆς ἡ ταῖς παρὰ τῶν λεπέων θεραπείαις οἰκαμνούντες ὅμιλοι

maxime Christianis non licet vi castigare sontium delicta. Saculi quidem iudices, ubi maleficos sub legum potestate nacti sunt, multum potestatis jus exercent, et invitos quamvis prohibent ex suopله ingenio vivere. At apud nos non cogendo sed suadendo id agendum est, ut qui ejusmodi sit, melior evadat. Neque enim nobis a legibus ad coercendos peccatores potestatis jus datum est, et si datum

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the same nature as other kingdoms; adding, that if it had been, it would, like other kingdoms, have been defended by its fighting men. But no: if he had asked for legions, they would have been legions of angels. And what he did on the part of his authority, he did, not by human, but by divine agency, even when he drove the money-changers out of the temple. For the scourge which he then used was a sign, not an instrument, of divine wrath; as in other cases, the oil and the spittle was not the remedy, but the sign of cure. And to this purpose Augustine speaks on that passage of St John.

3 A bishop is required by St Paul, among other things, not to be a striker. So Chrysostom says, that to rule by force, that is human force, belongs to kings, not to bishops. And elsewhere, such power is not given to us that we can constrain men from offending by the authority of our judgments, (such, that is,) as include a right of execu-

quæ jus exsequendi per manum regiam, aut militarem, "aut juris qualiscunque humani ademtionem in se contineat) cohibeamus homines a delictis: et episcopum officio suo fungi ait οὐ βιαζόμενον, ἀλλὰ πείθοντα, non cogendo, sed suadendo. Et ex his quidem satis apparet, episcopos, qua tales sunt, jus regnandi in homines humano more nullum habere. <sup>x</sup>Hieronymus regem et episcopum comparans: ille nolentibus præest, hic volentibus.

*maxime esset, locus non esset juris ejus exercendi, cum Deus coronet non eos qui necessitate sed qui voluntate libera a malo abstinent: quare multo labore opus ut persuadeantur morbi sponte sua se præbere sacerdotali curationi.* Et mox: (pag. 10) οὐ γάρ ἐλκύσαι πρὸς βιαν δοτίν, οὐδὲ ἀναγκάσαι φόβῳ· neque enim qui a fide aberrat vi pertrahī, immo nec metu compelli potest. Idem ad Ephes. iv. εἰδίδασκαλαν λόγου προεχειρίσθη μεν, οὐκ εἰς ἀρχὴν, οὐδὲ εἰς αὐθεντίαν, συμβούλων τάξιν ἐπέχομεν παρανούτων. ὁ συμβουλεύων λέγει τὰ περὶ διαυτοῦ, οὐκ ἀναγκάζω τὴν δικροτήν, ἀλλ' αὐτὸν δέψιοι τῆς τῶν λεγομένων αἱρέσεως κύριον: ad docentes vero homines constituti sumus, non ad imperium, non ad exercitium potestatis. Consiliorum locum obtinemus suadentium; qui consilium dat, de suo dicit, auditorem non cogit, sed liberam ei relinquit electionem circa ea qua dicuntur. (Tom. iii. p. 823.) Ambrosius libro ii. de Cain et Abel c. 4. Sacerdos quidem officium suum exhibet, at nullius potestatis jura exercet. Citatur c. verbum, de Pænitentia Distinct. i. (Cap. 51.)

<sup>u</sup> Aut juris qualiscunque humani ademtionem] Ad reges enim non ad ecclesiam pertinent judicare de feudis. c. novit 18. de judiciis: de possessio-

nibus: c. causam que inter 7. qui filii sint legitimi. Reges enim superiorē in temporalibus minime recognoscunt: c. per venerabilem, 13. eod. tit. Christus voluit ut Christiani Imperatores pro vita eterna Pontificibus indigerent, et Pontifices pro curia temporalium rerum imperialibus legibus utebentur, quantum spirituali actio a carnalibus distractari incursum, et Deo militans minime secularibus negotiis se implicant: c. quoniam, 8. distinct. x. et c. cum ad verum, 8. distinctione xvi. unde aliena non sunt que libro primo sunt poita, c. 11. § ultimo, num. 8. ex secundo et octuagesimo canone eorum qui apostolice dicuntur, et que in eam rem ibi plura in textu notisque afferuntur.

<sup>x</sup> Hieronymus] Idem in epitaphio Nepotiani: minus licet episcopo quam regi. Ille enim nolentibus præest: hic volentibus. Ille terrori subjicit, hic servituti donatur. (Tom. i. pag. 25, Edit. Basili.) Cassiodorus Lib. xi. in epistola ad episcopos. (Ep. 3.) episcopos doceat, ne judez possit inventre quod puniat. Fredericus primus Imperator apud Gutherum Ligurino de Pontifice, (Lib. vi. vers. 362, 363): Ecclesiam regat ille suam, divinaque jura Temperat: imperium nobis fascesque relinquat. Suenonem Danie regem excommunicata-

tion of the judgment by the hands of kings, or soldiers, or by the deprival of any human right: and he says also, that a bishop discharges his office, *not by coercing, but by persuading*. From this it appears sufficiently, that bishops, as such, have no right of ruling men in a human manner. So Jerome, comparing a king and a bishop, says, that *the king rules unwilling subjects, the bishop, willing ones*.

4 Whether Christian kings may make war on kings who reject

**4** An vero reges ipsi iis qui Christianam religionem rejiciunt, arma quasi pœnæ nomine inferre possint, supra capite de pœnis a nobis disquisitum est quantum instituto sufficit.

XV. Hoc quoque monebo non frustra, sed quia veteribus recentia conferens magnum malum, ni caveatur, prævideo, justam belli causam non dare <sup>7</sup>spem conceptam ex aliqua divinorum vaticiniorum explicatione. Nam præterquam quod <sup>7</sup>quæ nondum impleta sunt oracula interpretari certo vix

tum cum Roschildensis episcopus Wilhelmus ab ingressu ecclesie oppositu baculi pastoralis arceret, et regii capulis admoveant manum, fecit quod episcopi erat, et cervicem porrexit. [Vide *Saxonem Grammatic.* Lib. xi. pag. 189, 190.] Addo quæ supra habuimus libro I. c. 5.

**7 Spem conceptam ex aliqua divinorum vaticiniorum explicatione]** Vide de Theodoro quodam, Gratiani tempore, Zosimum (Lib. iv. c. 13) et Ammianum Marcellinum (Lib. xxix. c. 1) de Joanne Cappadoce Procopium *Persicorum* II. (cap. ult.) et Leunclavium *Historiarum Terciarum* Lib. xviii.

**8 Quæ nondum impleta sunt oracula interpretari certo vix contingit sine propheticō spiritu]** Claudi enim obsignatiique sunt libri prophetici ad præfinitum usque tempus, ita ut intelligi nequeant, Danielis XII. 4, 8, 9. Hieronymus ad Danielem (Tom. V. p. 606 B.) si propheta audivit et non intellexit, quid facient hi qui signatum librum et usque ad tempus consummationis multis obscuritatibus involutum presumptionem edisserunt? Procopius *Gothicorum* I. (cap. 24) τῶν γὰρ Σιβύλλης λογίων τὴν διάνοιαν πρὸ τοῦ ἥργου ἐξερεύνων διθράσπῳ οἷμα αἰδόνατα εἶναι. *Sibyllinorum oraculorum sensum ante rei eventum invenire existimo supra ho-*

*minem esse.* Μοι: ταῦτα τε αἰδόνατά ἔστιν διθράσπῳ ὀτφοῦν πρὸ τοῦ ἥργου τῶν Σιβύλλης λόγων ἔνυεῖναι, ἢν μὴ καὶ δὲ χρόνος αὐτὸς ἐκβάντος ἡδη τοῦ πράγματος, καὶ τοῦ λόγου εἰς πεῖραν διλέντος, ἀκριβῆτι τοῦ ἔπους ἐρμηνευτῆς γένηται· fieri nequit, ut homo qualisunque ante exitum *Sibyllina oracula* intelligat, sed exspectandum, donec ipsa dies, re jam consummata, et verbis experiencing comprobatis, certa fiat carminum interpretes. Gregoras libro V. d.λλ. ὕσπερ καὶ τόλλα τῶν χρημαδονμένων δυσείκαστά ἔστι καὶ δυσχύμβολα καὶ πλειστας δεχόμενα τὰ δνελίξεις καὶ δναπτύξεις μέχρις αὐτῆς ἐκβάσεως· οὕτως καὶ οὗτος δὲ χρημάδες ἀπλάγα τοὺς πλείστους, καὶ αὐτὸν δὴ τὸν βασιλέα Ἀνδρόνικον μέχρις αὐτῆς τελευτῆς, ὡς εἰρήσται. ἐξ αὐθράσπων δὲ αὐτὸν γενομένου, αὐτὸς ἔαυτὸν δὲ χρημάδες διεσάφησεν sicut et prædictiones aliae difficillime conjectu interpretatuque sunt, quod et multa habeant involucra, et explications recipiant multas: ita et hoc oraculum decepit omnes, ipsoque Imperatorem, quamdiu ei vita manerit. Eo autem erepto rebus humanis, ipsum semet oraculum hominibus aperuit. (Pag. 67. Edit. Genvens.) Cavete vobis nimis audaces theologi: cavete vobis a nimis audacibus theologis politici. Dignus

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Christianity, on that ground, as a punishment, we have sufficiently discussed above.

XV. I will also give a warning not superfluous, but because, comparing old speculations with new, I foresee a great evil if it be not averted. A just cause of war cannot be derived from any explanation of the divine prophecies. For besides that unfulfilled prophecies can hardly be interpreted with certainty without the spirit of prophecy,

contingit sine prophetico spiritu, etiam rerum certarum latere nos possunt tempora. Ac postremo prædictio, nisi expressum adsit Dei mandatum, jus nullum dat, cum Deus, quæ prædictis, sæpe per improbos homines aut pravas actiones ad exitum ire permittat.

XVI. Illud quoque sciendum est, si quis quid debet, non ex justitia propria, sed ex virtute alia, puta liberalitate, gratia, misericordia, dilectione, id sicut in foro exigi non potest, ita nec armis deposci. Nam ad utrumque horum non sufficit, ut id, quod postulatur, sit ex morali ratione faciendum, sed præterea opus est in nobis jus quoddam sit ad illud, quale jus interdum leges divinæ et humanæ dant etiam circa debita aliarum virtutum: quod cum fit, nova tunc debendi ratio accedit, quæ jam ad justitiam pertinet. Id cum deest, [[Flor. iii. 9;  
Strabon  
Geogr. xiv.  
p. 684.]] injustum ex hac causa bellum est, ut Romanorum in regem Cypri tanquam ingratum. Nam qui beneficium dedit, nullum habet jus ad reposendam gratiam: alioqui contractus esset, non beneficium.

*Vict. de Jure  
Bell. n. 2.*

XVII. 1 Notandum et hoc sæpe accidere, ut bello causa quidem justa subsit, sed vitium actioni accedat ex animo agen-

qui inspiciatur locus apud Thuanum  
libro LXXIX. in anno c. 10. lo LXXXIII. de  
Jacobo Brocardo.

*Honoris studium*] Quod vitium  
maxime nobis virtutis quadam imagine  
blanditur. Sed recte monet Augustinus

even if the events are certain, we may be wrong as to the time. And lastly, the prediction, except there be an absolute command of God, gives no right, since the events which are predicted by God are often brought to pass by wicked men or wicked actions.

XVI. This also must be observed; that if any one has a claim upon him, which is not a claim of justice, but of some other virtue, as liberality, kindness, mercy, charity; as this claim cannot be prosecuted in a court of justice, so also it cannot be asserted by arms. For neither the one nor the other of these can be resorted to, in order that what is demanded may be done for a moral reason: it is requisite besides, that there be in us some right to that very thing: which right sometimes divine and human laws give with respect to the claims which rest upon other virtues [than justice]; and when this happens, then there is introduced a new reason of obligation, and the matter belongs to justice. When that is wanting, the war is unjust for that reason: as was, for instance, the war of the Romans against the king of Cyprus, because he was ungrateful. For he who has bestowed a benefit has no right to require a return: if he had, it would be a contract, not a benefit.

tis: sive quod aliud quiddam, non illicitum per se, magis et principalius animum movet quam jus ipsum, puta <sup>a</sup>honoris studium, aut utilitas aliqua, sive privata sive publica, quæ ex bello ipso seorsim a causa sua justifica considerato exspectatur: sive quod adest affectus plane illicitus, ut gaudium acquiescentis in malo alieno sine boni respectu. Sic Aristides de societate secunda, Phocenses ait merito periisse, at non bene fecisse Philippum, cum eos perderet, quippe non religioni studentem, quod præferebat, sed augendo imperio. Tom. II. pp. 236, 237.

2 Una et ea vetus causa bellandi est, inquit Sallustius, *Fragm. iv. 3. profunda cupido imperii et divitiarum. Aurum et opes præcipuae bellorum cause, apud Tacitum: et in tragœdia:*

Rupere fedus impius lucri furor,  
Et ira præceps.

*Hist. iv. 74.  
Sen. Hippol. v. 340.*

Quo et Augustini illud recte referas: *nocendi cupiditas, ulcisci crudelitas, implacatus et implacabilis animus, feritas rebellandi, libido dominandi, et si quæ sunt similia, hæc sunt quæ in bellis jure culpantur.* Contr. Faust. xxii. 1. 74

3 Sed hæc, ubi causa justifica non deest, peccatum quidem *Covarr. d. p. 2. in c. Pacz. 5. 9. n. 2. Cajeſt. 2. 2 q. 40. art. 1. Silv. Verd. Bellum, n. 2. Summa Ang. Vero. Bellum, n. 5. Sum. Ros. 50. n. 3. et 8. Thom. 2. 2. 66. 8.*

libro III. *de Civitate Dei*, cap. 14. *Satius esse cuiuslibet inertie pœnas luere, quam illorum armorum gloriam querere.*

Repete quæ ex Agathia supra possumus  
hic ad § 3. [Sed in illis locis bella ar-  
guuntur per se injusta. *J. B.*]

XVII. 1 We must remark also that this often happens; that there is a just cause really existing for the war, but that the putting it in action becomes vicious from the intention of the agent: either because something else, not in itself unlawful, incites him more than the right, as for instance, the desire of honour, or some advantage, public or private, which is expected from the war, distinct from the justificatory cause; or because there is introduced some affection plainly unlawful, as a pleasure in doing mischief to another without respect of good. So Aristides says that the Phœceans were deservedly destroyed; but that Philip was not in the right when he destroyed them, as not being really in earnest in defense of religion, but seeking to increase his empire.

2 An eminent and ancient cause of war, says Sallust, is a deep-seated desire of empire and of wealth. So Tacitus, *Gold and riches, a principal cause of war.* And so in Seneca's tragedy of the *Hippolytus.* And so Augustine.

3 But these causes, in which a justifying cause of the war is not wanting, do indeed imply a fault in him who makes the war; but yet the war itself is not thereby unjust: and, therefore, for such a war, no restitution is due.

## CAPUT XXIII.

### DE CAUSIS DUBIIS.

- I. *Dubitandi causa in moralibus unde.*
- II. *Nihil faciendum contra animi dictamen quamvis errans.*
- III. *Judicium in alteram partem duci argumentis rerum.*
- IV. *Aut auctoritate.*
- V. *Si utrinque dubitetur in re gravi, et alterum sit eligendum, sumendum quod est tutius:*
- VI. *Unde sequi, tali casu a bello abstinendum.*
- VII. *Id autem vitari posse collo-*
- VIII. *Aut arbitrio: ubi de Christianorum regum officio circa partes bellantes:*
- IX. *Aut etiam sorte.*
- X. *Certamen singulare, ad vietandum bellum, an permitti possit.*
- XI. *Meliorum esse conditionem possidentis in pari dubio.*
- XII. *Si neuter possideat, in pari dubio rem dividendam.*
- XIII. *An bellum utraque ex parte justum detur, multis distinctionibus explicatur.*

<sup>1</sup> *Edu. Nic.* I. I. VERISSIMUM est quod scripsit Aristoteles, in moralibus non æque, ut in mathematicis disciplinis certitudinem inveniri; quod eo evenit, quia mathematicæ disciplinæ a ma-

<sup>a</sup> *Ut nihil habeant interjectum]* In his mutatio sit *els τὸ αὐτικέλμενον*, in aliis *els τὸ μεραξύ*.

<sup>1</sup> Expendit hoc PUFENDORPIUS nos-  
ter, *De Jure Nat. et Gentium*, Lib. I.  
cap. 2. § 9. Quaecumque Auctor heic  
dicit, id tantum probant, æpe sic satis  
difficile esse axiomata et principia Dis-  
ciplinarum Moralium ad casus singu-

lares aptare: unde tamen ipsas Disci-  
plinas incertas esse minime sequitur.  
Qua de re vide quæ observavimus in  
Præfatione nostra ad Opus Pufendor-  
fianum modo laudatum, § III. num. 3.  
*J. B.*

<sup>b</sup> *Solent habere interjectum aliquid]*  
Vide Chrysostomum ad IV. Ephesiorum  
31. moral. [id est, in *τῷ ηθικῷ Homilie*

### CHAPTER XXIII. *Of Doubtful Causes of War.*

I. What Aristotle wrote is most true, that certainty is not to be found in morals as it is in mathematics: of which the reason is this, that mathematics separate the forms of things altogether from matter: and that the forms are of such a nature that there is nothing intermediate between two of them; as between a straight line and a curve there is no medium. But in moral matters, circumstances, even the least, often vary the matter; and the forms that are treated have often intermediate degrees, of such latitude that the case sometimes approaches nearer to the one extreme, sometimes to the other. Thus between that which ought to be done, and that which is entirely unlawful, there is a medium which is allowable, nearer

teria omni formas separant, et quia formæ ipsæ tales plerumque sunt, <sup>a</sup>ut nihil habeant interjectum, sicut inter rectum et curvum nihil est mediæ. <sup>1</sup>At in moralibus circumstantiæ etiam minimæ variant materiam, et formæ, de quibus agitur, <sup>b</sup>solen habere interjectum aliquid, ea latitudine, ut modo ad hoc, modo ad illud extremum propius accedatur. Ita enim inter id quod fieri oportet, et inter id quod fieri nefas est, medium est quod licet, sed modo huic, modo illi parti propinquius: unde ambiguitas sœpe incidit, ut in crepusculo, aut in aqua frigida calescente. Et hoc est, quod ait Aristoteles, ἔστι χαλεπὸν <sup>iii. Nic. 1.</sup> ἐνίοτε τὸ κρίνειν ποῖον ἀντὶ πολού αἱρετέον· *quid cui anteponendum sit, difficilis sœpe est judicatio.* Andronicus autem Rhodius: τὸ κατ' ἀλήθειαν δίκαιον δυσχερές <sup>Petr. 1. 3.  
P. 10.</sup> ἔστι τοῦ δοκοῦν- *τος διελεῖν difficile est id, quod vere justum est, ab eo, quod tale videtur, discernere.*

II. 1 Primum autem illud est tenendum, etiamsi quid justum reipsa est, sed ab eo fit, qui, omnibus expensis, injustum id existimat, actum esse vitiosum. Hoc enim est, quod dicit Paulus Apostolus, quicquid non fit ex fide, peccatum esse: <sup>Rom. xiv. 23.</sup> <sup>c</sup>quo in loco fides animi judicium de re significat. Nam vim judicatricem humanis actionibus ducem Deus addidit, qua contenta obbrutescit animus.

illius, Tom. III. p. 844. Edit. Savil.]

<sup>c</sup> Quo in loco fides animi judicium de re significat] Eodem tendunt in eadem Pauli epistola eodem capite ista (vers. 5) ἔκαστος ἐν τῷ ἰδίᾳ νοῇ πληροφορεῖσθως υπεροχεῖσιν sui sensus sibi certus sit. Et (vers. 22) μακάριος ὁ μὴ κρίνων ἄντον ἐν φ' δοκιμᾶσει· *beatus ille, qui, quod præfert, in eo sui damnata-*

*tor non est.* Ambrosius: *peccatum est, quod aliter fit quam probatum est.* Sequitur Augustinus: citati ambo a Gratiano post cap. 14, causa 28. quest. 1. Non longe hinc abit illud Plutarchi in Timoleonte: δεῖ οὐ μόνον τὴν πρᾶξιν εἶναι καλὴν καὶ δικαίαν, ἀλλὰ καὶ τὴν δόξαν αὐτῆς πράττεται μόνιμον καὶ δμετάπτωτον, ἵνα πράττωμεν δοκιμά-

sometimes to the one, and sometimes to the other: whence an ambiguity often takes place, like twilight between day and night, or cold water gradually heated. And this is what Aristotle says, that it is often difficult to decide which of two things is to be preferred: and so Andronicus Rhodius.

II. 1 In the first place, this is certain [as a point of morality], that if anything be just in itself, yet if it be done by him who, having deliberately weighed, thinks it unjust, the act is vicious: as St Paul says, that whatsoever is not of faith is sin; in which place *faith* signifies the judgment of the mind concerning the act. For God has given us the power of judging, as the guide of human actions; and if this be despised, the mind is brutified.

**2** Sæpe autem accidit, ut judicium nihil certi monstret, sed hæsitet: quæ hæsitatione si attenta consideratione expediri nequeat, sequendum erit illud Ciceronis: *bene præcipiunt qui vetant quicquam agere quod dubites æquum sit an ini- quum.* Hebræi magistri <sup>2</sup> dicunt: *הַסְתֵּל מִן הַסְתֵּלָה abstinence a re dubia.* Sed hoc locum habere non potest, ubi alicui omnino alterutrum est faciendum, et de utroque, an æquum sit, dubitatur: tunc enim <sup>3</sup> licebit ei eligere, quod minus ini- quum ei videtur. Semper enim, ubi electio evadi non potest, minus malum rationem induit boni. Τὰ ἐλάχιστα ληπτέον τῶν κακῶν, ait Aristoteles: Cicero, *de malis minima.* Quintilianus: *in comparatione malorum boni locum obtinet levius.*

**III.** Plerumque vero in rebus dubiis post examen aliquod animus non in medio hæret, sed huc aut illuc ducitur <sup>4</sup> argu- mentis ex re potitis, aut ex opinione, quam habet de aliis hominibus, sententiam super ea re pronunciantibus. Nam et

Vasq. I. 2.  
disp. 62 c. 1.  
num. 1. med.  
1. 2. quest. 14.

*σαρτες* requiritur non modo, ut, quod agitur, sit honestum justumque, sed ut firma ac constans adsit persuasio, unde fiat actio, ut, quod sit, fiat ideo quod animus ita faciendum judicaverit. (Pag. 238 c.)

<sup>4</sup> Qui vetant quicquam agere quod dubites] Plinii Lib. I. epist. 18. Quod dubitas, ne feceris.

\* Rabbi GAMALIEL, in PIRKE ABOTH, pag. 14. Ed. P. Fagii. J. B.

<sup>5</sup> Hoc non satis recte dici, ostendit PUFENDORFIUS, Lib. I. cap. 3. § 8. ubi

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**2** It often happens that the judgment does not pronounce a certain decision, but hesitates: and if this hesitation cannot be cleared off by an attentive consideration, Cicero's rule must be followed; those advise well who direct you not to do anything of which you doubt whether it is just or unjust: and so the Hebrew masters say, *Abstain from doubtful things.* But this does not apply in cases where we absolutely must do one of two things: in that case we must choose the part that seems least unjust. For in all cases in which the election cannot be avoided, the less unjust assumes the character of good. The least of evils is to be chosen. So Aristotle, Cicero, Quintilian.

**III.** But in most cases, in dubious matters, the mind after some examination, does not remain undecided, but is drawn this way or that, by arguments derived from the subject, or by the opinion which it has of other men who deliver their sentiments on the subject. For

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Aristides de concordia ad Rhodios ait, sicut in facti quæstionibus id pro vero habetur unde plures maximeque idonei stant testes, ita sententiarum eas sequendas, quæ plurimis præstan-

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Φρασσόμενος τέ κ' ἔπειτα καὶ εἰς τέλος θνω  
ἀμείνων.

\*Εσθλὸς δ' αὐτὸν εἰς εἰδὼν πιθηγανόν.

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Ἐν θυμῷ βάλληται, δ' ὅτι ἀχρήσιος ἀνήρ.*

Ille quidem ante omnes, per se ipso quid utile, quid non  
Qui videt, et longe fines prospectat agendi:  
Qui bene consultis didicit parere, secundius:  
At qui consilii pollet nihil ipse, nec audit  
Sudentes alios, nullus homo virit ad usus.  
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*Vict. de Ind.  
Rel. I. n. 12. et  
de Jure Belli,  
21. et 24.*

*I. Topic. 1.*

*Tom. II. p.  
378 s. c.*

2 Sæpe autem accidit, ut judicium nihil certi monstret, sed hæsitet: quæ hæsitatione si attenta consideratione expediri nequeat, sequendum erit illud Ciceronis: *bene præcipiunt qui vetant quicquam agere quod dubites æquum sit an ini- quum.* Hebræi magistri <sup>2</sup> dicunt: *רְאֵבָד בְּנֵי כָּל הָעָם אֶת־הַמִּשְׁמָרָתָךְ* absteine te a re dubia. Sed hoc locum habere non potest, ubi alicui omnino alterutrum est faciendum, et de utroque, an æquum sit, dubitatur: tunc enim <sup>3</sup> licabit ei eligere, quod minus iniquum ei videtur. Semper enim, ubi electio evadi non potest, minus malum rationem induit boni. Τὰ ἐλάχιστα ληπτέον τῶν κακῶν, ait Aristoteles: Cicero, *de malis minima.* Quintilianus: *in comparatione malorum boni locum obtinet levius.*

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Qui videt, et longe fines prospectat agendi:  
Qui bene consultis didicit parero, secundus:  
At qui consilis pollet nihil ipso, nec audit  
Sudentes alios, nullus homo vivit ad usus.  
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\* Quoted by Aulus Gellius, *Noct. Attic. XIII. 18. J. B.*

tissimisque nitantur auctoribus. Sic Romani veteres non nisi consulto collegio facialium ad id instituto, Imperatores Christiani vix nisi auditis episcopis, bella suscipiebant, ut, si quid esset, quod religionem posset injicere, ejus monerentur.

V. 1 Accidere autem in multis controversiis potest, ut ab utraque parte probabilia se ostendant argumenta, sive intrinseca, sive ab aliorum auctoritate. Id cum accidit, si res mediocres sunt, de quibus agitur, videtur vitio carere posse electio, in utramvis partem cecideret. At, si de re magni momenti, ut de supplicio capitali hominis, agitur, jam propter magnum discrimen, quod est inter eligenda, <sup>5</sup> præferenda est pars tutior, ut dici solet:

Terent.  
Adelph. ii. 1.  
90.

In istam partem potius peccato tamen.

Ideo satius est nocentem absolvere, quam innocentem condemnare.

§ 22. n. 13.

2 Scriptor problematum quæ Aristotelis nomen præferunt: ἔκαστος ημῶν μᾶλλον ἀν προέλοιπτο τοῦ ἀδικοῦντος ἀποψηφίσασθαι ὡς οὐκ ἀδικεῖ, ἢ τοῦ μὴ ἀδικοῦντος καταψηφίσασθαι ὡς οὐκ ἀδικεῖ (quibus in verbis vulgo pro ἀδικοῦντος legitur μὴ ἀδικοῦντος, et contra) *nemo est nostrum*, ait, *qui non malit absolvere quamvis nocentem, quam damnare innocentem*. Et mox addit rationem, quam jam dedimus: ἔστι γὰρ, ὅταν

<sup>5</sup> *Praefenda est pars tutior*] Ammianus Marcellinus libro XXVIII. *Si implacabiles iracundia sunt, summa est acerbitas: sin autem exorabiles, summa levitas: quæ tamen, ut in malis, acerbitate anteponenda est.* [Cap. i. p. 562. ex Cicerone ad Q. Fratrem, Epist. 1.] Et hoc explicat Vasquez dicto libro, c. 4. num. 21.

<sup>b</sup> *Omnia prius experiri quam armis]* Dionysius Halicarnassensis in excerptis legationum: μή πρότερον ἀρξαι τῶν ἔργων πρὶν τὴν πειραθῆναι τῶν λόγων· *non ante ad res veniendum est, quam tentata sit verborum via.* (Pag. 704. Edit. Oxon.) Menelaus apud Libanum: πρώτον μὲν γὰρ τὰ δίκαια τῷ λόγῳ πειράσθαι λαμβάνειν, ἀλλὰ μὴ τοὺς ὄπλους

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there were any impediment which religion interposed, they might be warned thereof.

V. 1 It may happen, in many controversies, that probable arguments are adduced on both sides, either intrinsic to the subject, or derived from the authority of others. When that happens, if the things in question are of moderate importance, the choice, it would seem, is free from blame, on whichever side it falls. But if there is question of a matter of great moment, as of a capital punishment, then, on account of the great difference between the two sides of the choice, the safer part is to be preferred. It is better to acquit a guilty man than to condemn an innocent.

*τις ἀμφιδοξῆ, τὰ ἐλάττω τῶν ἀμαρτημάτων αἰρετέον· nam ubi quis dubitat, eligendum in quo minus delinquitur. Antiphon: εἰ δέοι τι ἀμαρτεῖν, τὸ ἀδίκως ἀπολύσαι ὁσιώτερον, orat. xiv. xv. ἢ τὸ ἀδίκως ἀποκτεῖναι, ἀσέβημα· si errandum est, sine jure absolvere, quam per injuriam condemnare, est sanctius. Nam in illo error est, in damnatione insontis, facinus.*

VI. Maximi autem momenti est bellum, ut ex quo mala plurima etiam in innocentes sequi soleant. Ideo inter sententias alternantes vergendum ad pacem. Laudatur Silio Italico Fabius:

P. 133.  
[pp. 140, 12.]

Lib. i. v. 679.

Cauta speculator mente futuri,

Nec laetus dubiis parvisque laccessere Martem.

Tres autem sunt modi, quibus vitari potest, ne controversiae in bellum erumpant.

VII. 1 Primum est, colloquium, *cum duo sint genera disceptandi*, ait Cicero, *unum per disceptationem, alterum per vim, cumque illud proprium sit hominis, hoc belluarum, configiendum est ad posterius, si uti non licet priore.* Et Terentius:

Eunuch. iv.  
7. 19.

<sup>b</sup> Omnia prius experiri quam armis sapientem decet:

Qui scis, an quo jubeam sine vi faciat?

ἐπιπηδᾶν, ἀνθρωπινάτερον δήπουθεν·  
homini convenientius, prius verborum  
experimentum facere, quam statim ad  
arma proslire. (Declam. i. pag. 196 D.  
Ed. Paris. Morell.) Non aeneunt hinc  
illa chorii dicta in Euripidis *Helena*  
(vers. 1168, [1150] et seqq.):

τὸ θεῖον

\*Ἐτος δὲθες εὔρον

Ἄφρονες, δύοι τὰς ἀρετὰς πολέμηρ

Κράσθε, δύρδες ἀλκείου

Δογχᾶσι κατατευμένοι  
Πόνους θνατῶν ἀπαθῶ.  
Εἰ γέρ τιμῆλα κρινὲ τιν  
Δίματος, οὐ ποτ' ἔρε  
Διάψιει κατ' αἰφρέστον πόλεις.  
Stulti nimium, quids virtutis  
Mensura placet unica, ferrum;  
Quibus humani pausa laboris  
Non nisi servo queritur ense:  
Nam si virtus sanguine tantum  
Spectanda venit, nunquam discors  
Furor infestas deseret urbea.

2 The writer of the Problems which go under the name of Aristotle's, says this: and adds the reason just given. So Antiphon.

VI. War is a very weighty matter, being a thing from which great calamities fall upon the innocent. Therefore when opinions are balanced, peace must have the preference. So Silius Italicus praises Fabius.

But there are three ways in which controversies may be prevented from breaking out into war.

VII. 1 The first is, Conference. *There are two ways of settling disputed questions*, says Cicero; *one by discussion, the other by force: and the first being the character of man, the second of brutes, we are to*

*Argon. III.  
185.  
Supplic.  
v. 547.*

Apollonius Rhodius dixit: μηδ' αὐτως ἀλκῆ πρὶν ἔπεσσι γε πειρηθῆναι. Et Euripides:

Λόγοισι πείσων. εἰ δὲ μὴ, βίᾳ δορός.  
Verbis id impetrabo: sin nequeo, manu.

Idem reprehendit *Supplicibus* civitates, quae hanc viam omitterent (vers. 748):

Et vos quoque, urbes, quae, quod est verbis datum  
Transigere, potius fertis ad cædem arbitram.

Achilles *Iphigenia in Aulide* (vers. 1017, et seqq.):

Si parer aequo, nil mea vobis ope  
Opus est; salutis est in hoc uno satis.  
Ego simul amici gratiam servaverim:  
Minusque vitio vertet omne agmen mihi,  
Ratione si rem gesserim, non viribus.

Quod in *Phœnissis* apud Euripidem legimus (vers. 519):

πῶν γὰρ ἐξαρεῖ λόγος  
δ καὶ σιδηρὸς πολεμίων δράσειν ἄν·

*Lib. xxxv. 45.* Id auctum sic extulit apud Livium Phœneas: <sup>1</sup>multa homines, ne bellare necesse sit, voluntate remittere, quæ bello et armis cogi non possint. Mardonius apud Herodotum *Po-*

*Lib. vii. 9.*

<sup>1</sup> *Multa homines, ne bellare necesse sit, voluntate remittere, quæ bello et armis cogi non possint]* Donatus ad *Eunuchum*: *pervulgatum est enim, quod summa vi defenderis quam extorquetur, hoc idem postmodum remitti remittenti.* (Act. I. Sc. II. vers. 94.)

<sup>k</sup> *Compromisum]* Spreta plerumque potentioribus via. Vide *Connestagium de Conjunctione regnum Castellæ et Portugalliae*, digna tamen, quam insistant æqui et pacis amantes. Fecere magni reges ac populi, quorum in textu memoria. Addamus alios. Arbitri sumti inter Magnum Norvagia et Canutum Danie reges de regno utroque certantes: Nempe quomodo Julianus

primus ejus nominis cum Severo de principatu Romano certante interdicto agere voluit. [SPARTIAN. in *Vit. Pescennii Nigri*, cap. 2.] Magnus rex Suevæ arbiter sumitus inter Ericos duos Danie et Norvagia reges. In federe Lacedæmoniorum et Argivorum apud Thucydidem: δίκας διδόντας κατὰ τάπτια, qui stare arbitris volent more avito. Et mox: εἰ δέ τις τῶν ξυμμάχων πόλεις πόλει ἐρίξοι, δι τολμηὶ διθεῖν ἄντινα τοιαν ἀμφοῖς ταῖς πόλεσι δοκοῖν εἰ qua sociarum civitatum cum socia civitate controversiam habeat, rem deferant ad civitatem, qua utrisque æqua videbitur. Est utrumque apud Thucydidem libro v. (c. 79.) M. Antoninum multi extra

*have recourse to the latter, only if the former fails.* So Terence, Apollonius Rhodius, Euripides in several places; and Phœneas in Livy goes further; saying, *In order to avoid war we are to yield many things which cannot be gained by war.* And Mardonius in Herodotus blames the Greeks for not trying negociation before war, being of the same language.

2 Coriolanus in Dionysius says, *If a man asks only for his own,*

*lymnia* Græcos culpat hac in parte: *τοὺς χρῆν ἔόντας ὁμογλώσσους, κήρυξι τε διαχρεωμένους καὶ ἀγγέλοισι, καταλαμβάνειν τὰς διαφορὰς καὶ παντὶ μᾶλλον ἡ μάχησι· quos oportuit, cum ejusdem essent linguae, caduceatorum et legatorum opera, non præliis, controversias tractare.*

2 Coriolanus apud Halicarnassensem: *τὸ μὴ τῶν ἀλλοτρίων ἐπιθυμεῖν, ἄλλα τὰ ἑαυτῶν ἀπαιτεῖν, καὶ μὴ τυγχάνοντα τούτου πολεμεῖν, ἀπαντεῖ ἀν ὁμολογοῦσιν εἰναι καλόν· si quis non aliena cupiat, sed sua postulet, atque, iis non impetratis, bellum moveat, id omnium confessione σῷον est.* Apud eundem Halicarnassensem rex Tullus; *quæ verbis componi nequeunt, ea armis ait decerni.* Lib. III. II. Apud Tacitum Vologeses: *æquitate quam sanguine, causa Ann. xv. 2. quam armis retinere parta majoribus malueram.* Et rex Theodoricus: *tunc utile solum est ad arma concurrere, cum Cass. III. Var. locum apud adversarios justitia non potest invenire.* L.

VIII. 1 Alterum est inter eos, qui communem judicem nullum habent, <sup>κ</sup> compromissum: *ἐπὶ τὸν δίκας διδόντα οὐ νόμιμον ὡς ἐς ἀδικοῦντα iέραι, ait Thucydides: in eum, Lib. I. 26. qui arbitrum accipere paratus est, nefas ut in injuriosum*

Romanum imperium populi controver-  
siarum suarum, ut bella vitarent, arbitri-  
um sumsero: meminit Victor et alii.  
Apud Procopium *Gothic.* III. Gepidæ  
Langobardis dicunt: *δίκη γάρ διαλύειν τὰ διάφορα ἐν σπουδῇ ἔχομεν. δικάζεσθαι δὲ οὐδὲ ἀπονομάζεται, βιάζεσθαι οὐδαμῇ πρόσεστιν arbitrio sumto diri-  
mere controversia parati sumus: at qui stare judicio volunt, eos vi impetrere ini-  
quum est.* (Cap. 34.) Apud eundem  
*Gothicorum* IV. Theudibaldus Franc.  
rex paratum se ostendit, judicem acci-  
pere de his, quæ Romani disputabant.  
(Cap. 24.) Vide et quid olim Romani  
Philippo significaverint apud Polybium  
excerpto legionum n. 4. et quod est

in federe Antiochi ex eodem Polybio  
itidem in excerptis n. 35. Rex Anglie  
judex de Scotia successione: Comes  
Holsatus inter regem Danie et fratres,  
Pontano memorante *Historia Danice*,  
libro VII. Adde exempla apud Maria-  
nam libro XXIV. cap. 20. XXIX. cap. 23.  
Parutam libris VII. et XI. Bizarum  
libro XII. Crantzium libro VI. *Saxo-  
nicorum* c. 15. et nostra infra libro III.  
cap. xx. § 46. [Quod de Marco Antonino  
dicit Auctor, nec in iis, quæ no-  
mine Aurelii Victoris circumferentur,  
reperio, nec alibi. Certe in Epitome  
Victoris id dicitur de Antonino Pio.  
J. B.]

and betakes himself to war only when he cannot get that, all allow that it is just. And in the same writer, Tullus says, that what cannot be settled by discussion must be decided by arms. So the Vologeses in Tacitus: and so king Theodoric.

VIII. 1 Another way is Compromise, or Arbitration, between parties who have no common judge. As Thucydides says, It is wicked to proceed against him as a wrong doer, who is ready to refer the question to

*ire.* Sic de regno Argivo Adrastus et Amphiaraus Eriphylæ judicium permiserunt, narrante Diodoro. De Salamine inter Athenienses et Megarenses lecti judges Lacedæmonii quinque.

Lib. iv. 67.  
Plut. in Sol.  
p. 83 n.  
Apud dictum modo Thucydidem Corcyrenses Corinthiis significant, paratos se disceptare controversias apud Peloponnesi civitates, de quibus inter ipsos convenisset. Et Periclem

Orat. Plat. II.  
p. 248 n.  
Tom. III.  
laudat Aristides, quod, ut bellum vitaretur, voluerit δίκην διαλύεσθαι περὶ τῶν διαφόρων, *de controversiis arbitros sumere.* Et Isocrates <sup>5</sup> oratione adversus Ctesiphontem laudat Philippum Macedonem, quod quas habebat cum Atheniensibus controversias, de iis paratus esset ἐπιτρέπειν πόλει τινὶ ἵση καὶ δυοῖς, *arbitrium permittere alicui civitati aequae utriusque parti.*

Liv. III. 71.  
2 Sic olim Ardeates et Aricini, postea <sup>6</sup> Neapolitani et Nolani, controversias suas arbitrio populi Romani permiserunt. Et Samnites in controversia cum Romanis <sup>7</sup> ad communes amicos provocant. Cyrus sibi et Assyrio arbitrum fert regem Indorum. Poeni in controversiis cum Masinissa, ut bellum vitent, ad judicia provocant. Romani ipsi de con-

<sup>5</sup> Nulla est Oratio Isocratis adversus Ctesiphontem, cuius vel nomen nescio an ullibi apud Oratorem illum legatur. Voluit Auctor dicere ἈΕΣΧΙΝΕΜ, in cuius notissima Oratione hæc reperias,

pag. 286 a [65, 27]. J. B.

<sup>6</sup> De his nil, nec apud Livium, nec apud Dionysium Halicarnassensem.

Auctor noster exscriptis heic ALBERICUM GENTILEM, *De Jure Belli*, Lib. I. cap. iii. pag. m. 23. Sed narratur res a CICERONE, *De Offic. I. 10.* Et VALER. MAXIMO, VII. 3. num. 4. J. B.

<sup>7</sup> Aut valde fallor, aut idem est, quod paulo post Auctor refert, sed ita ut in posteriori loco vere tribuat Ro-

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an arbitrator. So Adrastus and Amphiaraus referred the question concerning the kingdom of Argos to the judgment of Eriphyle. So to decide the question concerning Salamis between the Athenians and the Megareans, five Lacedæmonian judges were chosen. So the Corcyreans signify to the Corinthians that they are ready to discuss their respective claims before the cities of Peloponnesus where they might agree to appoint. And Aristides praises Pericles, because to avoid war, he was willing to appoint arbiters. And so Æschines praises Philip for being willing to submit his controversies with the Athenians to any city equally just to both parties.

2 So the Ardeates and the Aretians in old time, and the Neapolitans and the Nolans later, referred their controversies to the decision of the Roman people. And the Samnites in controversy with the Romans appeal to common friends. So do the Carthaginians in their controversies with Masinissa to avoid war: and the Romans themselves concerning their controversy with the Samnites, refer to their common

troversia cum Samnitibus apud Livium ad communes socios. Lib. viii. 23.  
 Et Philippus Macedo in controversia cum Græcis ait se arbitrio usurum populorum, cum quibus pax utrisque fuisset. Item, xxii. 10.  
 Parthis et Armenis postulantibus Pompeius finibus regendis Plut. Pomp. p. 637.  
 arbitros dedit. Fecialium Romanorum hoc præcipuum ait officium fuisse Plutarchus: οὐκ ἔαν στρατεύειν πρότερον In Num. p. 68 A.  
 ἢ πᾶσαν ἐλπίδα δίκης ἀποκοπῆναι· ne sinerent prius ad bellum veniri, quam spes omnis iudicii obtinendi periisset. De Gallorum Druidibus Strabo: ὥστε καὶ πολέμους διῆτων Lib. iv. p. 197.  
 πρότερον καὶ παρατάττεσθαι μέλλοντας ἔπανον· olim et inter bellantes erant arbitri, ac sæpe jam acie congressuros diremerunt. Eodem officio functos in Iberia sacerdotes idem Lib. xi. p. 501.  
 testis est.

3 <sup>1</sup>Maxime autem Christiani reges et civitates tenentur hanc inire viam ad arma vitanda. Nam si, ut judicia alienorum a vera religione judicum vitarentur, et a Judæis et a Christianis arbitri quidam sunt constituti, et id a Paulo præceptum, quanto magis id faciendum est, ut majus multo vitetur incommodum, id est, bellum? Sic alicubi Tertullianis, Vict. de Jure Belli, n. 28.

manis, quod de Samnitibus nusquam legitur, quantum quidem sciām. Originem erroris indicavimus in Notis Gallicis. J. B.

<sup>1</sup> Maxime autem Christiani reges et civitates tenentur hanc inire viam] Gregoras libro x. de Alessandro Bulgaro:

ἀπηνῶς οὕτωσι κατ' ἀλλήλων ἐπιέναι, ἐνὸν ὁμοδοξεῖν ἀλλήλοις τὰ πρὸς εἰρί-  
 νην καὶ ὅμον κατὰ τῶν ἀσεβῶν παρα-  
 τάττεοθαί indecorum esse Christianis,  
 tanta cum acerbitate inter se arms cer-  
 tare, cum rationes sint conveniendi ad  
 pacem, et communes vires in impios ver-  
 tendi. (Pag. 219. Edit. Genev.)

allies. Philip of Macedon in his controversy with the Greeks, says that he will take the judgment of Peoples who are at peace with both. At the request of the Parthians and Armenians, Pompey gave arbiters to settle their boundaries. Plutarch says that this was the main office of the Roman Feciales, not to allow recourse to be had to arms till all hope of a peaceable decision was gone. And Strabo says of the Druids of the Gauls, that formerly they were arbiters between hostile parties, and often made them part without fighting, who were drawn up in warlike array against each other. The same writer testifies that the priests in Iberia had the same office.

3 But especially are Christian kings and states bound to try this way of avoiding war. For if, in order to avoid being subject to the judgments of persons who were not of the true religion, certain arbiters were appointed both by the Jews and by the Christians, and the practice is commanded by Paul; how much more is this to be done, in order to avoid a much greater inconvenience, namely, war. So in one place

[L. 2, 2.] **nus** argumentatur, non militandum Christiano, ut cui ne litigare quidem licet: quod tamen, secundum ea, quæ alibi diximus, cum temperamento quodam est intelligendum.

Molina, disp.  
103. § quando  
tit. Egid.  
Reg. de act.  
supern. disp.  
31. dub. 4.  
n. 72.

**4** Et tunc ob hanc, tum ob alias causas utile esset, imo quodammodo factu necessarium, conventus quosdam haberi Christianarum potestatum, ubi per eos, quorum res non interest, aliorum controversiae definiantur: imo et rationes ineantur <sup>m</sup>cogendi partes, ut sequis legibus pacem accipient: quem et ipsum olim apud Gallos <sup>n</sup>Druïdum fuisse usum Diodoro ac Straboni proditum. Etiam proceribus suis de regni divisione judicium permisisse Francos reges legimus.

Thom. 2, 2.  
qu. 95. art. 8.  
et idem Cajet.  
P. 599.

**IX.** Tertia ratio est <sup>o</sup>per sortem: quam in hoc commendat Dion Chrysostomus oratione in Fortunam altera: et multo ante Solomo Prov. xviii. 18.

**X.** 1 Sortis autem affine quid est certamen singulare, <sup>s</sup>cujuus usus non videtur omnino repudiandus, si duo, <sup>p</sup>quorum

<sup>m</sup> Cogendi partes, ut sequis legibus pacem accipient] Vide exemplum apud *Cassiodorum* III. 1, 2, 3, 4. et *Gaium de Pace Publica*, II. cap. xviii. n. 12.

<sup>n</sup> Druïdum fuisse usum] Druïdibus hac in parte, et meliori cum jure, episcopi successere. Vide epistolam episcoporum ad Ludovicum regem in capitulis Caroli Calvi, et de episcopis Hispanie Rodericum Toletanum libro VII. cap. 3.

<sup>o</sup> Per sortem] Vide Augustinum *de Doctrina Christiana* Lib. I. cap. 28.

<sup>s</sup> Vide infra Lib. III. cap. xx. § 43. et *PURENDORFIUM De Jure Nat. et Gent.* Lib. VIII. cap. viii. § 5. J. B.

<sup>p</sup> Quorum controversie aliqui totos populos gravissimis malis sint implicatae] Scriptor tragedie *Thebaidos*, [*Phœniss. vers. 564*]:

Rex sit e vobis ute,  
Manente regno querite.

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Tertullian argues that a Christian must not go as a soldier, since he may not even go to law; which latter, however, as we have already shewn, is to be taken with a certain limitation.

4 And both for this reason and for others, it would be useful, and indeed it is almost necessary, that certain Congresses of Christian Powers should be held, in which the controversies which arise among some of them may be decided by others who are not interested; and in which measures may be taken to compel the parties to accept peace on equitable terms. This was the office of the Druids of old among the Gauls, as Diodorus and Strabo tell us: and we read that the Frankish kings left to their nobles the judgment of questions concerning the division of the kingdom.

**IX.** The third way is by Lot; which method is commended for this purpose by Dio Chrysostom, and much earlier by Solomon, Prov. xviii. 18. [The lot causeth contentions to cease, and parteth between the mighty.]

**X.** 1 Closely related to the practice of casting Lots, is the prac-

controversiæ alioqui totos populos gravissimis malis sint impliciture, inter se parati sint armis decernere, ut olim de Peloponneso Hyllus et Echemus, de regione ad Inachum Hyperochus et Phemius, de Elide Pyræchma Ætolus et Degmenus Epeus, de Iba Corbis et Orsua. Videtur enim id, si non ab ipsis recte fieri, certe a civitatibus posse acceptari, ut minus malum. Apud Livium Metius Tullum sic alloquitur: *ineamus aliquam viam, qua utri utris imperent, sine magna clade, sine multo sanguine utriusque populi decerni possit.* Strabo vetustam hanc fuisse ait Graecorum consuetudinem: <sup>Ubi supra, vili. p. 357.</sup> *et apud Virgilium Æneas æquum fuisse ait, ut inter se et Turnum eo modo res definiretur.*

2 Certe <sup>inter ceteros Francorum veterum mores hunc impense laudat Agathias libro primo, cujus ipsa verba (sunt cap. 2. enim insignia) apponam: ἀλλ' εἴπερ ἄρα καὶ τιν' ἔριν τοῖς βασιλεῦσιν ἔγγενεσθαι συνενεχθείη, παρατάττονται μὲν</sup>

Dion Othonē: *πολὺ γάρ που καὶ κρεῖτον καὶ δικαιότερόν ἔστιν ἡνὶ ὑπὲρ πάντων η̄ πολλοὺς ὑπὲρ ἐνὸς ἀπολέσθαι: multo enim satius justiusque est, unum pro omnibus, quam multos unius causa perire.* [Xiphilin. pag. 204. B. Ed. H. Steph.]

<sup>4</sup> *Et apud Virgilium] Æneidos xi. Äquius huic Turnum fuerat se opponere morti.*

(Vers. 115.) Pari de causa Antonius

Octavium ad singulare certamen provocabat. Plutarchus *Antonio.* [Non ea de caussa, sed ἀντικομψάζων, ut dicit PLUTARCHUS, pag. 944 e. J. B.]

<sup>5</sup> *Inter ceteros Francorum veterum mores] Vide Caroli Calvi capitulum apud S. Arnulfum, et pactionem Aquisgranensem. Äquitas eadem apud Langobardos. Vide Paulum Warnaredi libro i. cap. 12. iv. cap. 17. v. cap. 40.*

tic of Single Combat: of which the use does not appear to deserve altogether to be repudiated, if two persons whose controversies would otherwise involve two peoples in great evils are prepared to decide the question by arms, as formerly Hyllus and Echemus fought for Peloponnesus; Hyperochus and Phemius for the region on the Inachus; Pyræchma the Etolian and Degmenus the Epean for Elis; Corbis and Orsua for Ibas. For we may grant that if that be not done by the parties without blame on their part, yet that it may be accepted by the states in question as the lesser evil. So in Livy Metius says to Tullus, *Let us take a course by which we may decide without great bloodshed in each people which shall govern the other.* Strabo says that this was an ancient custom of the Greeks, and in Virgil, Eneas says it was right that the question between him and Turnus should be so decided.

2 Among the other customs of the Franks, this is especially the object of Agathias's praise. He says that if their kings have any quarrel, the armies on each side are assembled and brought face to face,

ἀπαντες ὡς πολεμήσοντες καὶ τοῖς ὅπλοις διακριθησόμενοι, καὶ εἴτα ὁμόσε χωροῦσιν. ιδόντες δὲ ἀλλήλους ἐκατέρωθεν ἡ πληθύς, αὐτίκα τὸ χαλεπάνον ἀποβάλλοντες εἰς ὄμοφροσύνην μεταχωροῦσι, καὶ τοὺς ἡγεμόνας κελεύοντι δίκῃ μᾶλλον τὰ ἀμφίβολα διακρινήσασθαι. εἰ δὲ μὴ, μόνους ἑκείνους ἀγωνίζεσθαι, καὶ ἐν σφίσιν αὐτοῖς διακινδυνεύειν, ὡς οὐχ ὅσιον ὃν, οὐδὲ πάτριον, ιδίας αὐτῶν ἔνεκα δυσμενείας, τὰ κοινὰ πημαίνεσθαι καὶ ἀνατετράφθαι. εὐθύς τε οὖν τάς τε φάλαγγας διαλύοντι, καὶ τὰ ὅπλα τίθενται, καὶ τὸ λοιπὸν εἰρηνη αὐθις καὶ ἡμερότης, φοιτήσεις τε παρ' ἀλλήλους ἀφύλακτοι, καὶ ἐπιμιξίαι, καὶ φρούδα οἰχεται τὰ δεινά. οὕτως ἄρα αὐτοῖς τὸ μὲν ὑπήκοον δίκαιον καὶ φιλόπατρι. τὸ δέ γε ἄρχον εὑμενὲς ἐν δέοντι καὶ πειθήνιον<sup>\*</sup> si quæ forte inter reges orientur controversiæ, aciem quidem omnes instruunt, tanquam belaturi, ad rem armis decernendam: et obviam alii aliis procedunt. At ubi conspicati sunt se invicem exercitus, abjecta ira ad concordiam redeunt, et regibus auctores sunt, ut jure potius certent: aut si id nolint, ipsi inter se singulari dimicent certamine, et suo duntaxat ipsorum periculo rem transigant: neque enim aut aequo et bono, aut patriis institutis convenire, ut ipsi ob propria odia bonum publicum labefacient aut evertant. Ergo confestim solvunt exercitus, et restituta pace tuto inter se commeant, sublati malorum causis. Tanta in subditis cura justi-

\* Magis tamen ad id tenetur qui petit, quam qui possidet] Vide Herrem tomo II.

<sup>†</sup> Vide supra, cap. v. § 18. J. B.  
<sup>‡</sup> Distinguendæ sunt varia acceptio-nes vocis justi] Sic Gratianus causa xi.

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and then the kings are told to fight the matter out between themselves, and the two armies lay down their arms and mix like friends.

XI. But though in a doubtful case, both parties are bound to seek for conditions of compromise by which war may be avoided, the party which makes a claim is more bound than the party which is in possession. For that in parity of case, possession is a presumption, to be accepted as favourable, is a matter which agrees not only with civil but with natural law: of which we have given the reason from the Problems ascribed to Aristotle, [cap. v. § 12.] And we may here add, that he who knows himself to have a good cause, but has not sufficient documents to convince the possessor of the injustice of his possession, cannot lawfully make war; because he has not the right of compelling the other to give up possession.

*tiae et patriæ amor: in regibus vero animus placidus et suis obsequens.*

XI. Quanquam vero in causa dubia pars utraque teneatur quærere conditiones, quibus bellum vitetur, "magis tamen ad id tenetur, qui petit, quam qui possidet. Ut enim in pari causa melior sit possidentis conditio, non civili tantum juri sed et naturali convenit: cujus rei causam alibi etiam ex Aristotelis quæ dicuntur problematibus attulimus. Atque hic et illud addendum est, ab eo, qui justam causam habere se scit, sed documenta non habet sufficientia, quibus possessorem de injustitia suæ possessionis convincat, bellum licite non sumi: quia non habet jus cogendi alterum, ut de possessione decedat.

XII. Ubi vero et jus ambiguum est, et neuter possidet, aut ex æquo uterque, ibi iniquus censendus erit, qui oblatam rei controversæ divisionem repudiatur.

XIII. 1 Ex his, quæ diximus, definiri potest illa a multis agitata quæstio, an bellum, ratione habita eorum, qui principales belli motores sunt, utrinque justum esse possit. <sup>L. fn part. 138. D. de R. I. Viet. de Jure Bell. n. 27. et 30. Less. de Just. c. 29. dub. 10. Molina. disp. 103. § in secundo vero. Lora 2. 2. § 3. disp. 53. n. 4.</sup> <sup>Distinguendæ enim sunt variiæ acceptiones vocis *justi*. Justum enim aliquid dicitur aut ex causa, aut secundum effectus. Ex causa rursum, aut speciali acceptione justitiæ, aut illa generali, qua omnis rectitudo eo venit nomine. Specialis acceptio iterum dividitur in eam quæ ad opus pertinet, et eam, quæ pertinet ad operantem; quarum <sup>1</sup>illa potest dici</sup>

quæstione iii. post c. Episcopus, 65. <sup>Covarr. c. Peccat. 5. in. n. 6. Ale. 2. parad. 21. Vulgat. l. 5. de Just. Piccol. vi. Phil. Civili. c. 21. Alberic. Gent. 1. 6.</sup> <sup>tiva, in sola prima Editione leguntur, et in aliis omissa sunt incuria typothetarum, ut quisvis videt. J. B.</sup>

<sup>1</sup> Hæc omnia, quarum illa.....nega-

XII. But when the right is ambiguous, and neither is in possession, or each is equally so, then if one of the parties refuse to divide the matter in question, he is to be reckoned unjust.

XIII. 1 From what we have said, we may decide the question moved by many writers, whether a war, regarded in reference to those who are the principal movers of it, can be just on both sides. We must distinguish various acceptations of the word *just*. A thing is called just from its cause, or from its effect. And again, from its cause, either in the special acceptation of justice, or in that general acceptation in which all rectitude or rightness comes under that name. Again, the special acceptation is divided into that which belongs to the act itself, and that which belongs to the agent; of which the former may be called positive, the latter negative. For the agent

positiva, hæc negativa: nam ipse operans juste agere interdum dicitur, quoties injuste non agit, etiamsi id, quod agit,

Lib. v. Eth. c. 10. et 11.  
Rhet. l. 13.  
Aug. xv. de Cito. Det. 5. et xix. 17.  
Covar. c. Pecc. § 10. n. 2.  
Vict. n. 32.  
Suar. de Leg. III. 8.  
Alph. de Cast. de Potest. leg. penal. l. 1. et 3.

justum non sit: quomodo recte distinguit Aristoteles, τὸ ἀδικεῖν, et τὸ ἀδίκου πράττειν, *injuste agere, et agere quod inustum est.*

2 Speciali et ad rem ipsam relata acceptance bellum utrumque justum esse non potest, ut nec lis; quia facultas moralis ad contraria, puta ad agendum et ad impediendum, non datur per rei ipsius naturam. At vero, ut neuter bellantium injuste agat, fieri sane potest: *injuste enim agit nemo, nisi qui et scit, se rem inustum agere: multi autem id nesciunt.* Sic *juste*, id est, bona fide litigari potest utrumque. Multa enim et in jure et in facto, unde jus oritur, fugere homines solent.

3 Generali acceptione justum dici solet, quod omni culpa agentis vacat. Multa autem etiam sine jure fiunt absque culpa, ob ignorantiam inevitabilem: cuius rei exemplum est in his qui legem non observant, quam sine culpa sua ignorant postquam lex ipsa promulgata est, et tempus per se ad scientiam sufficiens transiit. Sic et in litibus accidere poterit, ut pars utraque non modo inustitiae, sed et omni alio vitio

is sometimes said to act *justly*, when he does not act *unjustly*, although what he does be not *just*; as Aristotle rightly distinguishes, *to act unjustly, and to do an unjust thing.*

2 In the special acceptance of justice, as bearing upon the thing itself, a war cannot be just on both sides, as a lawsuit cannot. Because a moral claim to two contrary things, to act and to prevent the action, by the nature of the subject, cannot exist. But it may be that neither of the belligerent parties act unjustly: for no one acts unjustly except he who knows that he is doing an unjust thing: and many persons do not know this when it is so. Thus persons may carry on a lawsuit justly, that is, *bona fide* on both sides. For many points both of law, and of the facts from which the law arise, escape the notice of the parties concerned.

3 In a general acceptation, that is called *just* which is free from all fault of the agent. Many things are done without right, or done without fault, on account of inevitable ignorance; of which we have an example in those who do not observe the law, being ignorant of it without any fault of theirs, though it has been promulgated, and a sufficient time for their becoming acquainted with it has elapsed. So in litigation it may happen that both parties are free not only from injustice, but from all other vices; especially when both parties, or at

careat, præsertim ubi pars utraque, aut altera litigat non suo sed alieno nomine, puta ex tutoris officio, cui congruit jus etiam incertum non deserere. Sic Aristoteles in litibus juris iii. Rhet. 17. controversi, ait neutrum esse improbum, quod ipse dicit *πονηρόν*. Cui consentiens Quintilianus posse accidere ait, ut ex Lub. II. 17. utraque parte orator, id est, vir bonus, dicat. Imo et juste judicare judicem ambiguē dici ait Aristoteles, significari enim Top. I. 13. aut judicare *ὡς δεῖ*, *plane ut oportet*, sine ulla ignorantia, aut *κατὰ τὴν ἑαυτοῦ γνώμην*, *ex animi sui sententia*. Et alibi ait: *εἰ ἀγνοῶν ἔκρινεν, οὐκ ἀδίκει, si quis per ignorantiam judicaverit, non egit injuste.* Nic. v. 12.

4 At in bello vix est, ut temeritas saltem omnis et dilectionis defectus absit, ob negotii ipsius gravitatem, quæ omnino talis est, ut causis probabilitibus non contenta, quam maxime evidentes requirat.

5 At justum si accipimus, quoad effectus quosdam juris, certum est, bellum sensu justum utrimque dari, ut ex iis apparebit, quæ de bello publico solenni infra a nobis dicentur. Sic enim et sententia non ex jure lata et possessio sine jure habent quosdam juris effectus.

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least one, litigates not on his own account, but on that of another; as for instance, in consequence of the office of guardian or trustee, whose business it is not to desert a right which is only doubtful. So Aristotle says that in a doubtful question of law, neither side is bad; and Quintilian, that there are cases in which a good man may speak as an advocate on either side. Aristotle says too, that there are two senses in which we may say the judge judges rightly; the one, in which he judges as he ought according to the case, not making allowance for ignorance; the other, in which he judges sincerely as he thinks. To do this, as he says in another place, is not to judge unjustly.

4 But in war it cannot easily happen that there is not, on one side, at least temerity and a lack of charity, the matter being so grave, that we ought not to be content with probabilities, but should require evident causes.

5 If we take *just* as to some legal effects, it is certain that in this sense a war may be just on both sides; as will appear by what we shall have to say hereafter of a penal public war. So a sentence of a judge, though given not according to law, and possession without right, have certain legal effects.

## CAPUT XXIV.

### MONITA DE NON TEMERE ETIAM EX JUSTIS CAUSIS SUSCIPIENDO BELLO.

- I. *Jus sc̄epe remittendum, ut bellum vitetur :*
- II. *Maxime jus ad poenas :*
- III. *Pr̄esertim a rege laco.*
- IV. *Etiam cura sui et suorum abstinendum saepe bello.*
- V. *Regulae prudentiae circa electionem bonorum.*
- VI. *Exemplum in deliberatione inter studium libertatis et pacis : qua interneccio populi civi-*
- VII. *A paenit exigendis abstinere debere qui non multo sit validior.*
- VIII. *Restare, ut bellum non sit suscipiendum, nisi ex necessitate :*
- IX. *Ait ex maxima causa cum maxima occasione.*
- X. *Bellorum mala ob oculos posita.*

I. 1 **Q**UANQUAM instituti, quod de jure belli inscriptum est, pars proprie non videtur exsequi, quid circa bellum virtutes aliæ præcipiant aut suadeant, obiter tamen obviam eundum est errori, ne quis existimet, ubi jus satis com-

[*Non ob quamvis causam tamē bellum suscipiendum*] Seneca suasoria v. Gallio dixit, bellum suscipiendum fuisse pro libertate, pro conjugib⁹, pro liberis: pro re supervacua et nihil nocitura, si fieret, non esse suscipiendum. Plus aliquid Apollonius dixit regi Babylonias apud Philostratum Lib. I. cap. 23. (38. Edit. Olear.) προστείθει δὲ καὶ τὸ μῆδεν ὑπὲρ κωμῶν, ὃν μεῖζους κέκτηνται τάχα καὶ ίδιωται, διαφέρεσθαι πρὸς Πωμαίους, καὶ πόλεμον οὐδὲ ὑπὲρ μεγάλων αἱρεσθαι addidit vero, non oportere cum Romanis disputare de vicis, quibus majores privati sepe possident, ad bellum vero ne ob magnas quidem venire causas. Josephus altero libro adversus Appionem de popularibus suis: οὐτε τὴν ἀνόρτιαν ἡσκήσαμεν ἐτι τῷ πολέμους ἅρασθαι χάριν πλεονεξίας, ἀλλ' ἐπὶ τῷ τούτῳ νόμου διαφύλαττειν. τὰς γοῦν ἀλλων ἀλαττώσεις πράσει

### CHAPTER XXIV. *Warnings against making War rashly, even for just causes.*

I. 1 Although it might seem that we who profess to write about the Rights of War, that is, its justice, have nothing to do with the consideration of what other virtues besides justice command or recommend; yet we must try to obviate the error which would be committed if any one were to think that when the right was once established, it is forthwith either proper that war should be undertaken, or even that it is always lawful to undertake it. For on the contrary, it is mostly more right and more pious to give up one's rights. For as we have already said, we may even sacrifice our life in order to further, as much as is in us, the life and eternal salvation of another.

pertum est, statim aut oportere bellum suscipi, aut semper etiam licere. Contra enim evenit, ut plerumque magis pius rectumque sit de jure suo cedere. Nam nostræ quoque vitæ curam honeste deserî, ut alterius et vitæ et saluti perpetuæ, <sup>Vict. de Jure Belli, n. 14. et 33.</sup> quantum in nobis est, consulamus, supra suo loco dictum est. Maxime autem Christianis hoc convenit, qui in eo perfectissimum Christi imitantur exemplum, qui pro nobis adhuc impiis et infestis mori voluit, Rom. v. 6. Quod ipsum multo etiam magis nos excitat, ne res nostras aut nobis debitas persequamur cum tanto aliorum incommodo, quantum secum ferunt bella.

2 <sup>a</sup>Non ob quamvis causam talem bellum suscipiendum, <sup>Rhet. ad Alex. c. 3.</sup> et Aristoteles monet, et Polybius. Nec a veteribus <sup>laudatus</sup> <sup>Lib. iv. 31.</sup> Hercules, quod Laomedonti et Augiæ arma intulit ob non <sup>Pausan. v. 2.</sup> solutam laboris mercedem. Dion Prusæensis in ea oratione, quæ est de bello et pace, non hoc tantum ait quæri solere, <sup>eī p. 275 c.</sup> συμβέβηκεν ἀδίκημα παρὰ τούτων, οἵς διανοοῦνται πολεμεῖν, an injuria accepta sit ab his, de quibus bello petendis agitur, sed etiam, πήλικόν τε τούτῳ συμβεβηκός, quanti aestimandum sit id, quod accidit.

ὑπομένοντες, ἐπειδάν τινες ἡμᾶς τὰ νόμιμα κινεῖν διαγκάζωσι, τότε καὶ παρὰ δύναμιν αἰρούμεθα πολέμους καὶ μέχρι τῶν ἑσχάτων τὰς συμφορὰς ἔγκαρπεροῦμεν<sup>\*</sup> neque nostri fortitudinem exercent, ut suas res argeant, sed ut leges ipsius maneat: cetera igitur damna ferentes leniter, ubi sunt, qui nos a legibus cogant discedere, tunc etiam supra vires bella sumimus, et ad ultima usque mala duramus. (Pag. 493. § 47. division.

Hudson.)

<sup>1</sup> Sed nec vituperatus, saltem a PAUSANIA, cuius locus in ora libri indicatur, et ubi dicitur tantum, in illo bello nihil valde memorandum cessisse Herculem: Τῷ δὲ Ἡρακλεῖ πρὸς τὸν Αὐγίαν πολεμοῦντι, οὐδὲν ὑπῆρχεν ἀποδεικνυθεῖαι λαμπρὸν. Forte decepit Auctorem festinanter legentem, aut ex memoria laudantem, vox illa λαμπρὸν. J. B.

'And this is especially suitable to a Christian's character; who in doing this, imitates the perfect example of Christ, who was willing to die for us when we were yet ungodly and hostile. Which is a reason why we should not prosecute our rights or our dues to the inconvenience of others, to so great an extent as war occasions.

2 That war is not to be undertaken for every such cause, both Aristotle and Polybius teach us. Hercules is not praised\* by the ancients for that he took away the arms of Laomedon and Augias, because they did not pay him for his labour. Dio Prusæensis says that the question is to be asked, not only whether an injury has been

\* But neither is he blamed, at least in the passage of Pausanias quoted. J. B.

II. 1 Ad pœnas vero omittendas multa sunt, quæ nos hortantur. Videamus, quam multa patres in filiis dissimulant:

Lib. xlii. p.  
290 A, 2.

qua de re dissertatio est Ciceronis apud Dionem Cassium. *Pater*,<sup>b</sup> ut Seneca ait, *nisi multæ et magnæ injuriæ patientiam devicerunt, nisi plus est, quod timet, quam quod damnat, non accedit ad decretorium stylum*: unde non multum discrepat Phinei dictum, recitante Diodoro Siculo: *μηδένα πατέρα λαβεῖν παρ' οὐαν ἐκουσίως τιμωρίαν, εἰ μὴ τῷ μεγέθει τῶν ἀδικημάτων ὑπερθοῖντο τὴν φυσικὴν τῶν γονέων εἰς τέκνα φιλοστοργίαν*, et illud Andronici Rhodii, οὐδεὶς πατήρ ἀφίσταται τοῦ νιοῦ, εἰ μὴ ὑπερβαλλόντως εἴη μοχθηρός.

Lib. iv. 45.

Paraph. viii.  
18. p. 569.

Epist. 159.

2 At quisquis alium punire vult, *rectoris*, id est patris, quodammodo personam suscipit: quo respiciens Augustinus ad Comitem Marcellinum: *impi*, inquit, *Christiane iudex, pii*

<sup>b</sup> Ut Seneca ait] *De Clementia* 1. cap. 14. Augustus patri in consilio assidens de filio, qui in paricidio deprehensus esset, dixit: *relegandum, quo patri videretur. Non culeum, non serpentes, non carcerem decrevit: memor non de quo censeret, sed cui in consilio esset: mollissimo genere pœna contentum esse debere patrem dixit.* Verba sunt Senecæ eodem libro c. 15. Terentius *Andria* (V. 3. 32):

Pro peccato magno paululum supplici  
satis est patri.

Philo περὶ εὐγενείας ait: *πατέρας ἀκαρνήσεις χρηματίζειν τῶν οἰωνῶν, ἀποσχοντίζοντας αὐτὸς τῆς οἰκίας καὶ συγγενείας, δύνα τὴν ἐκ φύσεως περιπτήν*

*καὶ ὑπερβάλλοντας εὗνοιαν η̄ ἐν ἐκείνοις μοχθηρίᾳ κατακρατήσειν πατέρας abdicationis tristia verba pronuntiant, filiorique a domo sua et omni cognitione abrumpunt, ita demum, ubi amorem illum, quem ingentem ac super omnia existimatum natura parentibus indidit, filiorum improbitas vicit. (Pag. 904 B.) Cicero pro Ligario: ignoscite, Judices, erravit, lapsus est, non putavit: si unquam post hac ad parentem sic agi solet. (Cap. 10.)*

<sup>c</sup> Rectoris, id est patris, quodammodo personam sustinet] Seneca epistola LXXXVII: *Clementia alieno sanguini tanquam suo parcit, et scit homini non esse homine prodige utendum. Diodorus Sicus in fragmentis: οὐ δεῖ τοὺς ἀμαρ-*

received from those with whom we think of going to war, but also at what amount it is to be estimated.

II. 1 To pass over offenses without punishment, is a course to which many reasons exhort us. See how many things parents overlook in children: on which Cicero in Dio Cassius treats; so Seneca; and Phineus in Diodorus; and Andronicus Rhodius.

2 Now whoever undertakes to punish another, assumes in a certain degree the character of a governor, that is, of a parent; as Augustine says to Count Marcellinus, *Christian judge, fulfil the office of a pious parent.* The Emperor Julian praises a speech of Pittacus; *who prefers pardon to punishment.* So Libanius says, that he who wishes to be like God, rejoices more in forgiveness than in punishing.

*patris officium.* Pittaci dictum laudat Julianus Imperator : ὁς τὴν συγγνώμην τῆς τιμωρίας προετίθει, qui veniam pœnæ præferebat. Libanius in oratione de seditione Antiochena : qui Deo, inquit, similis esse vult, ἀφεῖς τιμωρίας χαιρέτω μᾶλλον ή λαμβάνων, magis gaudeat condonations quam pœna.

3 Interdum eæ sunt rerum circumstantiæ, ut jure suo abstinere non laudabile tantum sit, sed et debitum, ratione ejus, quam hominibus etiam inimicis debemus dilectionis, sive in se spectatae, sive qualiter eam exigit sanctissima lex Evangelii. Sic quosdam esse diximus, pro quorum, etiamsi nos impetant, salute mortem optare debeamus, quod eos sciamus rei communi humanæ aut necessarios aut valde utiles. Si res quasdam negligi vult Christus, ne lites subeantur, tanto credendum est majora a nobis negligi voluisse, ne ad bellum eatur, quanto bellum lite est nocentius.

τήσαντας ἐκ παντὸς τρόπου κολάζειν, ἀλλὰ τοὺς ἐπὶ τοῖς ἡμαρτημένοις μὴ μεταδίδασκομένους<sup>οὐ</sup> non omnes omnino, qui deliquere, puniendi sunt, sed ii, quae male factorum nihil paenitet. (E. Lib. xxii. n. 17.) Chrysostomus de Statuis vi. (Tom. vi. p. 504. Edit. Savil.) μαθέτωσαν οἱ ἀπίστοι πάντες, ὅτι ὁ τοῦ Χριστοῦ φόβος πᾶσαν ἔξουσιαν δύναται χαλινοῦν. δόξασόν τοις συνδούλοις ἔφει τὰ δημαρτήματα, ἵνα καὶ αὐτὸς σε δόξανη μειζόνως, ἵνα ἡμέρων τοι κατὰ τὴν τῆς κρίσεως ἡμέραν δεῖχη τὸ δύμα καὶ γαληνὸν, τάντης μεμνημένος σον τῆς φιλανθρωπίας<sup>διστοντες</sup> discant omnes, qui a fide

Molin. tract.  
11. de Just.  
disp. 103.  
Lorca disp.  
153. n. 11.  
Regid. Reg. de  
act. supern.  
disp. 31. dub.  
7. n. 107.

nostra sunt extranei, reverentiam, quæ Christo exhibetur, tantam esse, ut cuilibet potestati injiciat frænos. Honora dominum tuum: condona peccata conservis tuis, ut et ipse multo magis te honoret, ut in illo judicii die vultum tibi ostendat serenum atque clementem, hujus tuæ lenitatis memor. Citat Gratianus causa XXIII. quæst. iv. ex Augustino, [aut potius Beda, in Galat. c. 6]: duo ista nomina cum dicimus, homo et peccator, non utique frustra dicuntur: quia peccator est, corripe: quia homo, miserere: vide et quæ sequuntur, et quæ supra posuimus ad caput xx. § 12. § 26. et 36.

3 Sometimes the circumstances of the case are such, that to abstain from exercising one's right is not only laudable, but a duty; taking account of the kindness which we owe even to enemies, either considered in itself, or in the way in which the holy law of the Gospel requires it of us. And thus, we have said that there are some cases in which, even when we are attacked, we ought to prefer the salvation of the assailant, even to our own life, because we know him to be either necessary or extremely useful to the general interests of humanity. If Christ enjoins that some things are to be given up only to avoid strife, we must still more believe that he would have us give up greater things rather than go to war, since war is so much more hurtful than mere strife.

4 *De suo jure virum bonum aliquid relaxare non solum*

*liberalitatis, sed plerumque etiam commoditatis est*, ait Ambrosius. Aristides suadet civitatibus συγχωρεῖν καὶ παριέναι ὁ, τι ἀν ἡ μέτριον, concedere et largiri, si quid sit mediocre. Rationem addit: ὥσπερ γάρ καὶ τῶν ιδιωτῶν ἐπαινεῖτε τοὺς εὐγνώμονας καὶ βλαβῆναι τινα μᾶλλον αἰρουμένους ἡ διαφέρεσθαι πρός τινας· nam et privatorum hominum eos laudatis, qui facili sunt ingenio, et damni aliquid subire malunt quam litigare. Xenophon historiæ Græcæ sexto: σωφρόνων μὲν δήπου ἔστι, μηδὲ εἰ μὴ μικρὰ τὰ διαφέροντα εἴη, πόλεμον ἀναιρεῖσθαι sapientum est, ne ob graves quidem causas, bellum suscipere. Et apud Philostratum Apollonius: πόλεμον οὐδὲ ὑπέρ μεγάλων αἴρεσθαι ne ob magnas quidem causas bellum capiendum.

III. 1 Circa poenas, officii primum nostri est, si non ut hominum, certe ut Christianorum, ut facile ac libenter condonemus, quæ in nos sunt commissa, sicut Deus nobis condonat in Christo, Eph. iv. 32: τό γε περὶ τούτων ἀόργητον ὑπὲρ ἀν τὸ Σῆν ὑπεύθυνον τῇ κολάσει γίνεται τῶν ἡδικητῶν, Θεοῦ φύσει προσετέθη, ait Josephus: *ira vacare circa ea, ob quæ nocentes pœnae mortis sunt obnoxii, ad divinam naturam accedit.*

2 Seneca de Principe: *Longe sit in suis quam in alienis exorabilior injuriis. Nam quemadmodum non est magni animi qui de alieno liberalis est, sed ille qui quod alteri*

<sup>4</sup> *Certe ut Christianorum*] Theodosius, ut Antiochenis condonaret crimen in se commissum, a Flaviano episcopo illis maxime Christi verbis permotus fuit: *dimitte illis, Pater, quia nesciunt quid faciunt.* Narrat Chrysostomus de Status vicesima. [Tom. vi. pag. 602. Edit. Savil.]

<sup>5</sup> Josephus] *Antiquæ Historiae* Lib.

## II. (cap. vi. § 9. division. Hudson.)

<sup>6</sup> *Nec quicquam esse gloriarius principi impune lasso*] Chrysostomus in laude clementiae: ἀκαντα μὲν γὰρ ἀνθρώπου τοῦτο κοσμεῖν δύναται· διαφέροντες δὲ τοὺς ἐν ἔκουσιαις. τὸ γάρ πάντα ποιεῖν ἀπιτρεπόντες τὴν βασιλείας, κατέχειν ἔαντδι, καὶ τὸν τοῦ Θεοῦ νόμον ἡγεμόνα ποιεῖσθαι τῶν ἔργων, μέ-

4 So Ambrose says, that for a good man to relax somewhat of his rights, is not only a point of liberality, but often of convenience. So Aristides persuades cities to pardon and concede, if it be any moderate matter; adding the reason, that even in private persons this is laudable. So Xenophon, and Apollonius in Philostratus.

III. 1 With regard to punishments, it is, in the first place, our duty, if not as men, at least as Christians, to forgive willingly and freely offenses against us, as God in Christ forgives our offenses.

*donat sibi detrahit: ita clementem vocabo non in alieno dolore facilem, sed eum, qui cum suis stimulis agitatur, non prosilit: qui intelligit, magni animi esse, injurias in summa potentia pati, nec quicquam esse gloriostius principe impune lœso.* Quintilianus: *suadebimus principi, ut laudem huma-* <sup>Ind. orat. v. 13.</sup> *nitatis potius quam voluptatem ultionis concupiscat.* In C. Cæsaris laudibus posuit Cicero ut præcipuum, quod oblivisci <sup>Orat. pro Ligari. c. 12.</sup> nihil soleret nisi injurias. Livia in allocutione ad Augustum apud Dionem: *τοὺς ἀρχοντας νομίζουσιν οἱ πολλοὶ τοὺς μὲν* <sup>Lib. IV. p. 643 c.</sup> *τὸ κοινὸν ἀδικοῦσιν ἐπεξιέναι χρῆναι, τοὺς δὲ ιδίᾳ τι εἰς αὐτοὺς πλημμελεῖν δοκοῦντας φέρειν ita plerique existimant, rectoribus punienda, quæ contra communem utilitatem peccantur; quæ vero in ipsis, dissimulanda.* <sup>Epiſt. 22. in fin.</sup> Antoninus Philosophus, in oratione ad Senatum: *non enim unquam placet in Imperatore vindicta sui doloris, quæ et si justior fuit, acrior videtur.* Ambrosius in epistola ad Theodosium: *An-* <sup>Epiſt. 22. in fin.</sup> *tiochenis tuam donasti injuriam.* Et in ejusdem Theodosii laudibus ad senatum Themistius: *ὅτι οὐκ ἀντιβλάπτοντα* <sup>Orat. v. p. 157.</sup> *χρὴ τὸν ἀγαθὸν βασιλέα, ἀλλ' εὐ ποιοῦντα μείζω φαινεσθαι τῶν ἡδικηκότων bonum regem oportet his qui in se peccarunt superiorem esse, non vicissim nocendo, sed bene faciendo.*

3 Magnanimus qui sit, eum Aristoteles negat esse μνησί- <sup>Epiſt. Nic. iv. 8.</sup> κακον, injuriarum memorem: quod Cicero sic exprimit: *nihil De opa. I. 25.* magno et præclaro viro dignius placibilitate atque clementia. Hujus eximiæ virtutis insignia nobis exempla sacræ literæ

*γα μὲν εἰς εὐφημίαν τε καὶ δόξαν ὁμ-* *nem illa hominem ornare insigniter* *polet: maxime vero eos, qui in imperiis* *sunt constituti: nam cum regia potestas* *omnia permittat, semet retinere, ac divi-* *nam legem actionibus suis ducem præfi-* *cere, egregium est ad famam gloriamque.* (Tom. VI. pag. 753, 754.) Augustinus

epist. civ. quæ est ad Bonifacium co-  
mitem: *memento cito ignoroscere, si quis* *in te peccaverit et veniam postulaverit.* (Epist. 205. vulg. 189. autem § 8. di-  
vision. Benedictin.)

*¶ Antoninus Philosophus] Apud Vul-* *catium Gallicanum vita Avidii Cassii.* (cap. 12.)

Eph. iv. 32. So Josephus.

2 So Seneca characterizes a prince, that he forgives his own injuries more easily than those of others; so Quintilian; and Cicero of Cæsar, that he forgot nothing but injuries. So Livia in her address to Augustus in Dio: Antoninus the philosopher: Ambrose to Theodosius; Themistius in praise of the same Theodosius.

3 Aristotle makes it a character of the magnanimous man, not to remember evil done to him; which Cicero copies. The Scripture gives us great examples of this virtue in Moses and David. [See.] This

Dried. II. de  
Lbd. Christ.  
c. 8.

suppeditant in Mose, Num. xi. 12 et Davide, 2 Sam. xvi. 7. Maxime vero id locum habet, ubi aut nos quoque nobis peccati alicujus sumus consciit, aut id quod in nos peccatum est ab humana quadam et excusabili infirmitate procedit, aut satis apparet paenitere eum, qui nocuit. *Est ulciscendi et puniendi modus*, inquit Cicero, *et haud scio, an satis sit, b' eum, qui laccessierit, injuria sue paenitere*. Sapiens, inquit Seneca, *multa remittit; multos parum sani, sed sanabilis ingenii servabit*. Et haec quidem causae a bello abstinenti ex dilectione nascuntur, quam ipsis inimicis aut debemus, aut recte impendimus.

<sup>p. 68 n.</sup> IV. 1 Sæpe vero <sup>i</sup>n nobis ipsis nostrisque præstandum habemus, ne ad arma veniantur. Plutarchus in Numa vita ait, postquam juste posse suscipi bellum decrevissent feciales, <sup>k</sup>consultatum a senatu an ex usu esset suscipere. In parabola <sup>Luc. xiv. 31.</sup> quadam Christi dicitur, si quis rex cum rege altero bello certandum habeat, primo sedentem, qui mos est cum cura consultantium, expensurum apud se, an ipse, qui decem millia militum habeat, hosti ducenti bis totidem par esse possit;

<sup>b</sup> *Eum qui laccessierit injuria sua paenitere*] Procopius Vandalorum II. (Cap. 16.) μετάμελος γάρ ἐν δέοντι ἀπταικόσιν ἀτιγγυώμενος, συγγνώμην αὐτοῖς τοὺς ήδικιμένους ποιεῖν εἰσθεν· paenitentia in tempore oboriens τίς qui peccarunt ad veniam dandam provocare laesos solet.

<sup>c</sup> *Nobis ipsis nostrisque*] Procopius Gothicorum II Gotthos ita ait locu-

tos Belisario: δταν δὲ αὐτὰ οὐτως ἔχη, τοῦς ἐκατέρων ήγουμένους προσήκει μηδέξη τῆς οἰκείας τὴν τῶν ἀρχομένων επιτηρίαν προτείνω, ἀλλὰ τά τε δίκαια τά τε ἔμφορα, οù σφίσιν αὐτοῖς μόνον, ἀλλὰ καὶ τοῖς σφῶν ἐναντίοις ἐλέσθαι· *hac cum ita se habeant, officium erit utriusque gentis rectorum, subditorum sibi salutem non praivicere propria laudis studio, sed ea preferre, qua et*

holds especially when we are ourselves conscious of some wrong; or when the wrong done us proceeds from some human and excusable infirmity; or when it is evident that he who has done the wrong is penitent. So Cicero, and Seneca. And so far, of the causes of abstaining from war, which arise from the kindness which we either owe to enemies, or rightly bestow upon them.

IV. 1 Often also it is a duty which we owe to ourselves, and those who depend upon us, not to recur to arms. Plutarch, in the life of Numa, says that when the Feciales had decided that war might be undertaken justly, he consulted the Senate whether it was advantageous to enter upon it. In one of Christ's parables, we are told that when a king, going to make war, finds that his forces are inferior to those of his enemy, he desires conditions of peace. Luke xiv. 31.

2 So the Tusculans, bearing everything and refusing nothing,

quod si videat se imparem fore, antequam ille intra fines adsit, missurum legationem cum mandatis pacis causa.

2 <sup>1</sup>Sic Tusculani omnia patiendo, et <sup>m</sup>nihil recusando <sup>Liv. vi. 26.</sup> pacem a Romanis meruerunt. Apud Tacitum est: *frustra Hist. i. 64.* *adversus Eduos quasita belli causa. Jussi pecuniam atque arma deferre, gratuitos insuper commeatus præbuere.* Sic <sup>n</sup>legatis Justiniani Amalasuntha regina negavit armis se certaturam.

3 Potest et temperamentum adhiberi, ut a Syrmo Tribalorum rege factum Strabo memorat, qui *Alexandrum Mace-* <sup>Lib. vii. p. 301.</sup> *donem et insulam Peucen intrare vetuit, et simul donis eum honoravit, ut ostenderet se, quod faceret, justo metu, non odio aut contemptu ipsius facere.* Quod Euripides de Græcis <sup>Supplic. v.</sup> <sup>451. et seqq.</sup> dixit civitatibus, idem ad alios quosvis recte aptes:

De Marte quoties itur in suffragia,  
Nemo imminere cogitat mortem sibi:  
Sed quisque cladem destinamus alteri:  
Quod si in comitiis funera ante oculos forent,  
Furiata bello non perisset Græcia.

*justa sunt et utilia, non ipsis tantum, sed et hostibus.* (Cap. 6.)

<sup>1</sup> *Consultatum a senatu, an ex usu esset suscipere]* Diodotus apud Thucydidem III. (cap. 44) ἡτο γαρ ἀποφένω τάνι αἰδικοῦντας, οὐ διὰ τοῦτο καὶ ἐποκτεῖνα κελεύσω, εἰ μὴ ξυμφέρουν· etiamsi enim maxime illos peccasse prouinxi, non utique et occidi eos jubebo, nisi expediatur.

<sup>1</sup> *Sic Tusculani]* Vide Plutarchum Camillo (pag. 149.)

<sup>m</sup> *Nihil recusando]* Fecit idem Armeniorum rex Severi tempore: meminit Herodianus libro III. (Cap. 9. num. 3. Ed. Bacler.)

<sup>n</sup> *Legatis Justiniani Amalasuntha]* Vide Procopium Vandalicorum II. et (cap. 5) et Gotth. I. (cap. 3.)

obtained, by their merit, peace from the Romans. So Tacitus says of the Eduans, that a cause of war against them was sought in vain, for they did more than was demanded of them. So queen Amalasuntha told the ambassadors of Justinian that she would not contend with him in arms.

3 There may be also a moderation exercised in such cases, as Strabo relates of Syrmus king of the Triballi, who forbade Alexander of Macedon to enter the island of Peuce, and at the same time sent presents to him; shewing that what he did was done from a reasonable fear of the consequences, not from dislike or contempt of him. What Euripides said of the Greek cities, you may apply to any other parties; that if men could foresee the evils which war produces to themselves, they would avoid such a course. So Livy, and Thucydides.

Lib. xxx. 30. Apud Livium est: *cum tuas vires, tum vim fortunæ, Martemque communem propone animo.* Et apud Thucydidem: τοῦ πολέμου τὸ παράλογον ὅσον ἔστι, πρὶν ἐν αὐτῷ γενεσθαι, προδιάγνωθι: quicquid inopinum accidere potest in bello, priusquam aggrediare, considera.

Cap. 7. V. 1 Qui deliberant, partim de finibus, non quidem ultimis, sed interjectis deliberant, partim de iis, quæ eo ducunt. Finis semper est bonum aliquod, aut certe mali declinatio, quæ vicem boni obtinere possit. Quæ vero hoc aut illuc ducunt, per se non expetuntur, sed quatenus ducunt: quare in deliberationibus comparandi sunt, et fines inter se, et eorum quæ ad finem ducunt, facultas effectiva ad finem producendum: nam, ut recte dixit Aristoteles de animalium motione, αἱ προτάσεις αἱ ποιητικαὶ διὰ δύο εἰδῶν γίγνονται, διά τε τοῦ ἀγαθοῦ καὶ διὰ τοῦ δυνατοῦ, propositiones, quæ actionem efficiunt, duorum sunt generum, ab eo quod bonum est, et ab eo quod fieri potest: quæ comparatio tres habet <sup>2</sup> normas.

Orat. 1. De Pace, Tom. II. p. 63 R. 2 Prima est; si res, de qua agitur, æqualem, morali scilicet æstimatione, efficaciam habere videatur ad bonum et ad malum: ita demum eligenda est, si bonum aliquanto plus habeat boni quam malum mali. Hoc est, quod Aristides sic enuntiat: ὅτ' ἐλαττον τοῦ δυσχεροῦς τὸ ἀγαθὸν, κρεῖττον

<sup>2</sup> Harum regularum explicationem vide apud PUFENDORFIUM, *De Jur. Nat. ac Gent.* Lib. I. cap. 2. § 7. J. B.

Si efficacia ad bonum major sit collata efficacie ad malum, quam ipsum malum est collatum bono] Utitur hac

V. 1 Those who deliberate in such cases, deliberate partly concerning the ends, not the ultimate, but the intermediate ones, and partly, concerning the means which lead to the ends. The end is always some good, or at least the avoidance of evil, which may stand in the place of good. The means which lead to ends are not sought on their own account, but as they lead to the end. Therefore in our deliberations we must compare ends with one another, and the efficacy of the means to produce the end: as Aristotle says of the motions of animals.

There are three rules for such comparisons.

2 The first rule is, if the thing in question seems, in moral estimation, to have an efficacy both for good and for evil; it is to be chosen only if there is more of good in the good consequences than of evil in the evil. So Aristides and Andronicus Rhodius.

3 The second rule is, if the good and the evil which proceed from the thing be equal; it is to be chosen if the efficacy be greater for the good than for the evil.

*διηλλαχθαι.* Andronicus Rhodius, ubi magnanimum describit, <sup>Liber iv. §.</sup> p. 219.  
ait, eum non ob quasvis causas pericula subiturum, sed ob  
maximas.

3 Altera; si videatur esse æquale bonum et malum, quod a re, de qua quæritur, possit procedere: ita demum ea res eligenda est, si efficacia ad bonum quam ad malum major sit.

Tertia, si videatur et bonum et malum esse inæquale, nec minus inæqualis rerum efficacia: res ea ita demum eligenda est, <sup>si</sup> si efficacia ad bonum major sit collata efficaciam ad malum, quam ipsum malum est collatum bono; aut si bonum sit majus comparatione mali, quam efficacia ad malum comparata effi-  
cacia <sup>ad</sup> bonum.

4 Hæc nos limatus paulo; sed eodem tendit via planiore Cicero: cum ait, fugiendum, ne offeramus nos periculis sine <sup>Dicitur Opt. 1. 24.</sup> causa, quo nihil potest esse stultius: quapropter in adeundis periculis consuetudinem imitandam medicorum, qui leviter ægrotantes leviter curant, gravioribus autem morbis periculosas curationes et ancipites adhibere coguntur: quare subvenire tempestate sapientis esse dicit, eoque magis si plus adipiscare re explicata boni quam addubitata mali.

5 Et alibi: *Ubi ἐπίτευγμα magnum nullum fieri possit,* <sup>Epist. ad</sup> *ἀπότευγμα vel non magnum nocitum sit, quid opus est* <sup>Attic. xiii. 27.</sup>

regula prudenter Narses apud Proco-  
pium *Gothicorum* II. (cap. 18.)

<sup>3</sup> Vocem illam *efficacie*, quam in  
omnibus Editionibus manifesto deesse

dudum observaveram, in Not. ad modo  
dictum PUFENDORFI locum, fiderenter

restitui. J. B.

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The third rule is, if the good and the evil be unequal, and the efficacy to the one and the other also unequal; the thing is to be chosen, if the efficacy to good compared with the efficacy to evil be greater than the evil is compared with the good; or if the good compared with the evil be greater than the efficacy of the means for evil compared with its efficacy for good.

4 We have stated this somewhat formally. Cicero comes to the same result by a plainer way, when he says, that we are to avoid incurring danger without cause, than which nothing can be more foolish; wherefore, in incurring dangers, we are to imitate the practice of physicians, who, when men have a slight disease, cure them by slight means; but in more grave diseases, are compelled to apply dangerous and doubtful remedies. Whence, he says, the wise man must watch the occasion, and the more so, if you gain more good by the plain way than you can avoid evil by the doubtful way.

5 So Cicero in an Epistle to Atticus, Dio Prusseensis, Aristides.

Pag. 416 D. παρακινδυνεύειν? Dion Prusaensis Tarsensi altera: ἔστω δεινὸν καὶ ἄδικον. ἀλλ᾽ οὐκ εἴ τι μὴ δίκαιον πέφυκε γίνεσθαι, δεῖ πρὸς τοῦτο φιλονεικοῦντας αὐτὸν περιβάλλειν ἀτόπῳ τινὶ sit sane hoc injustum et indignum, quod toleretur. At non, si quid iniusti accidit, nos ideo debemus certandi studio posmet incommodis objicere. Et postea: ὥσπερ, οἶμαι, τὰ βάρη ταῦτ' ἀν μὲν σφόδρα πιέζῃ καὶ ἀνέχεσθαι μὴ δυνώμεθα, ζητοῦμεν ὡς τάχιστα ἀπορρίψαι· μετρίως δὲ ἐνοχλούμενοι καὶ ὄρωντες ἀνάγκην οὐσαν φέρειν ἡ τοῦτο, ἡ τούτου μεῖζον ἔτερον, σκοποῦμεν ὡς κουφότατα ἔπεσθαι· sicut onera, ubi ita valde nos urgent, ut durare nequeamus, quærimus abjcere: mediocriter autem pressi, et rebus talibus, ut aut ista aut graviora ferenda sint, in hoc nos componimus, ut quam expeditissime subsequamur. Aristides Sicula secunda: ὅτε μεῖζων ὁ φόβος τῆς ἑλπίδος, πῶς οὐκ ἀξιον φυλάττεσθαι· ubi major spe metus est, quomodo non tempus est cavendi?

Tom. II. p.  
22 D.

Hist. IV. 67.

Lib. IX. ep.  
ad Att. 4.

VI. 1 Exemplum sumamus ab eo, quod inter Gallias civitates consultatum olim narrat Tacitus: *libertas an pax placeret.* Libertatem intellige civilem, hoc est, jus regendæ per se reipublicæ: quod jus plenum est in statu populari, temperatum in statu optimate, præsertim tali, ubi nemo civium ab honoribus arceatur. Pacem vero talem, qua bellum redimatur internecinum, id est, ut Cicero alibi Græcis verbis hanc ques-

*p. In servitutem dedant, ne fame ac  
peste moriantur]* Guido Blandratensis  
in oratione ad Mediolanenses apud Gun-  
therum. (Lib. VIII. vers. 155, et seqq.)

Omnia securi pro libertate feremus.  
Sed libertatem contemta nemo salute  
Sanus amat neque enim certe susceptio cladia,  
Quam vitare queas, nisi cum ratione saluta,  
Libertatis amor, sed gloria vana putanda est.

VI. 1 Let us take an example from a deliberation which, as Tacitus relates, was held among the cities of Gaul, whether they would try for Liberty or for Peace: where, by Liberty, we are to understand Civil Liberty, that is, the right of governing themselves: which right is plenary in a popular state, limited in an aristocracy, especially in one in which no one of the citizens is excluded from honours; and by Peace, we are to understand such a one as is the alternative of an internecine war, or as Cicero says, quoting Greek, where the question is about endangering the whole fortunes of the State; where nothing less than the destruction of the whole people is portended; as was the condition of Jerusalem besieged by Titus. In such a case, what Cato would have said, who chose to die rather than submit to the rule of one man, every one knows: as Lucan says in that case, *It is an easy exercise of virtue to escape slavery by our own hand;* and many other things in the same strain.

tionem explicat, ἐὰν μέλλῃ διὰ τοῦτο περὶ τῶν ὅλων η̄ πόλις κινδυνεύειν. Puta, ubi recta aestimatio futuri nihil ferme aliud quam totius populi exitium videatur portendere: qualis erat status Hierosolymorum obsessorum a Tito. Hic Cato quid dicturus sit, qui mori quam uni parere maluit, nemo nescit; quo et illud pertinet:

Quam sit non ardua virtus  
Servitium fugisse manu.

Lucan. iv.  
576

Et multa alia ad eum modum.

2 At aliud dictat recta ratio: vitam scilicet, quae fundatum est omnium bonorum temporalium et aeternorum occasio, pluris esse quam libertatem; sive utrumque sumas in uno homine, sive in toto populo. Itaque Deus ipse pro beneficio imputat, quod non perdat homines, sed in servitutem tradat. <sup>2 Paral. xii. 7, 8.</sup> Et alibi suadet per Prophetam Hebraeis, ut sese Babylonii <sup>Jer. xxvii. 13.</sup> p̄ in servitutem dedant, ne fame ac peste moriantur. Quare illud quamquam laudatum antiquis,

Obsessum Poeno gessit quod Marte Saguntum:  
laudandum non est, nec quae eo ducunt.

Lucan. III.  
380.  
August. de  
Cie. Det.  
xxii. 6.

3 Internecio enim populi in hoc rerum genere pro maximo malo haberi debet. Cicero *de Inventione* secundo necessitatis hoc ponit exemplum, necesse esse Casilinenses se dedere Annibali, quanquam necessitatibus aderat haec adjunctio <sup>¶</sup>nisi malint

Cap. 57.

<sup>¶</sup>Nisi malint fama perire] Anaxilai, Xenophon. Procopius *Gotth.* iv. (cap. qui ob famem Byzantium desiderat, haec 12) οὐ γάρ ἐπαινοῦσι τὴν ἑκούσιον τε- defensio fuit: pugnandum hominibus in λευτὴν ἀνθρωποι, ἐνθα τις ἐπίκειται homines, non in rerum naturam: ita κρείσσων τοῦ κατ' αὐτὴν κινδύνου ἐλ-

2 But right reason dictates another course; namely, that life, which is the foundation of all temporal and the occasion of eternal good, is of more value than liberty; whether you take the alternative in a single man or in a people. And so God himself speaks of it as a benefit, that he does not destroy men, but delivers them into slavery; 2 Chron. viii. 7, 8, [of the remnant of the Canaanites spared by Solomon.] And in another place he, by the Prophet, persuades the Jews to submit to servitude under the Babylonians, that they may not die of famine and pestilence, Jer. xxvii. 11. And therefore the act of the Saguntines [who destroyed themselves in their city rather than yield it], though praised by the ancients, is not to be praised by us; nor the courses which lead to it.

3 For the destruction of a people, in questions of this kind, is to be held as the greatest of evils. Cicero puts this as an example of necessity, that it was necessary for the Casilinenses to surrender to

LIB. XVII. 10. In Othon. p. 1073 D.  
fame perire. De Thebanis, qui Alexandri Macedonis temporibus vixerunt, exstat hoc Diodori Siculi judicium: *τοῖς παραστήμασιν ἀνδρειότερον μᾶλλον ἡ φρουριώτερον χρησάμενοι προέπεσον εἰς πάνδημον τῆς πατρίδος ὄλεθρον· animi ἐγγενεῖς πολλοὶ οὐκ ἀναγκαῖος·* *culpandi sunt tanquam qui viros multos et egregios in Africa perdiderint, nullo operæ pretio.*

4 De eo, quem diximus, Catone et Scipione, qui post victoriam Pharsalicam cedere Cæsari noluerunt, judicium exstat apud Plutarchum: *αἵτιαν ἔχοντιν ὡς πολλοὺς καὶ ἀγαθοὺς ἄνδρας ἐν Λιβύῃ παραναλώσαντες οὐκ ἀναγκαῖος·* *culpandi sunt tanquam qui viros multos et egregios in Africa perdiderint, nullo operæ pretio.*

Orat. Plat. II. p. 263 B.  
Tom. III.  
5 Quod autem de libertate dixi, idem de aliis rebus expetibilibus dictum volo, si oppositi mali majoris justior aut pars sit exspectatio. Nam, ut recte Aristides, moris est, navem servare rerum, non vectorum jactu.

VII. In poenis quoque exigendis illud maxime observandum est, ne unquam eo nomine bellum suscipiantur in eum cui

*πίστιν non laudari mortem voluntariam homines, quamdiu spes aliqua est periculo potenter.* [Dictum, quod Auctor noster tribuit Anaxilao, non legitur apud XENOPHONTEM, eo loco ubi Historia illa narratur, *Hist. Græc.* Lib. I. cap. 3. § 12. Confudit forte Auctor, quod a Cyro dictum refert idem, Cyrip.

Lib. VI. c. 1. § 10. J. B.]

*ἐγγενεῖς πολλοὶ οὐκ ἀναγκαῖος·* *culpandi sunt tanquam qui viros multos et egregios in Africa perdiderint, nullo operæ pretio.* [Spiritu forti magis quam prudente]  
Idem cum explicasset consilia belli suscepti ab Atheniensibus post Alexandri mortem, ait, saniorum judicio eos πρὸς εὔδοξίαν οὖν βεβουλεῦνθαι· τοῦ δὲ συμφέροντος διημαρτυκέναι. *ad gloriam quidem recte consuluisse, sed ab utilitate*

Annibal; although they had the alternative of perishing by hunger. We have this judgment of Diodorus, concerning the Thebans of the time of Alexander of Macedon, that they were more brave than prudent, in bringing destruction upon their country.

4 Concerning Cato, of whom we have spoken, and Scipio, who after the victory of Pharsalia would not yield to Cæsar, we have Plutarch's judgment, that they were to be blamed for having caused the destruction of many brave and excellent men in Egypt, for no valuable purpose.

5 What I have said of liberty, I would have understood also of other desirable objects, if the expectation of a greater opposite evil be more just, or be equal. As Aristides said, men are accustomed to save the ship by throwing overboard, not the passengers, but the cargo.

VII. Again, in exacting punishment, that is especially to be observed; that we are never on such ground to engage in war with one who is as strong as ourselves. For as a civil judge ought to be much more powerful than the criminal, so must he be who undertakes

pares sunt vires. Nam ut judicem civilem, ita qui armis facinora velit vindicare, multo esse validiorem altero oportet: neque vero prudentia tantum, aut suorum caritas exigere solet, ut bello periculoso abstineatur, sed s<sup>e</sup>p<sup>e</sup> etiam justitia, rectoria scilicet, quae ex ipsa regimini natura superiorem non minus ad curam pro inferioribus, quam inferiores ad obedientiam obligat. Cui consequens est id, quod recte a theologis est traditum, regem qui ob causas leves, aut ad exigendas <sup>Cajet. 2. 2. q.</sup>  
93. art. 8.  
Molin. tract.  
1. de Just. c.  
102.

poenias non necessarias, et magnum secum periculum trahentes, bellum suscipit, teneri subditis ad reparationem damnorum, quae inde oriuntur: nam etsi non in hostes, in suos tamen veram committit injuriam, qui talibus de causis tam gravi malo eos implicat. Livius: *justum bellum quibus necessarium, et Lib. ix. 1.*  
*pia arma quibus nulla nisi in armis relinquitur spes.*

Optat hunc statum Ovidius *Fastorum* I. (vers. 715):

Sola gerat miles, quibus arma coercent, arma.

VIII. \*Rara ergo belli sumendi causa est, quae omitti aut non possit aut non debeat, puta cum jura sunt, ut *Florus* <sup>Lib. iv. 12.</sup>  
n. 32.

*aberrasse: ut ut qui properassent διακινδυνεύειν μηδεμάτι πρόσθικτης κατεπειγούσσης περιτιλαρι nulla necessitate impellente: ne Thebanorum quidem tam nobili clade passi se admoneri.* (Lib. xviii. c. 10.)

\* *Rara ergo belli sumendi causa est,*

*quae omitti aut non possit aut non debeat]*  
Servius ad illud in x. Aeneidos, (vers. 758):

*Iram miserentur inanom Amborum, et tantos mortalibus esse labore.*  
*Quia nulla causa tam justa est, ut prop- terea bellum geri debeat.*

to punish crimes by arms. And not only does prudence and charity for those who are dependent upon us require us to abstain from a perilous war, but often justice also, that is, rectorial justice; which, from the very nature of government, binds the superior to care for the inferiors, no less than the inferiors to obey the superior. From which it follows, as theologians have observed, that a king who undertakes wars for light causes, or for the purpose of exacting punishments which are not necessary, and which bring great danger with them, is bound to his subjects for reparation of the loss thence arising to them; for if he do no injury to the enemy, he does one to his own subjects, when, for such causes, he implicates them in so great evils. As Livy says, war is just, when it is necessary; *their* arms are pious, who have no hope left except in arms. This is what Ovid wishes:

No arms be borne save those which put down arms.

VIII. Thus the cases are rare, in which war, either may not or ought not to be avoided; in cases only when, as Florus speaks, the enforcement of rights is worse than arms. Seneca says, *We may*

[Lib. I. de Clement. c. 12.] loquitur, armis sseviora. Seneca *incurri*, ait, *in pericula*, ubi quiescenti paria metuuntur, aut etiam pejora: quem sensum Aristides sic extulit: τότε χρὴ καν ἄδηλον η̄ τὸ μέλλον αἰρεῖσθαι κινδυνεύειν, δταν τὸ τὴν ἡσυχίαν σγειν φανερῶς χεῖρον η̄ miseram pacem bello bene mutari, ait Tacitus, nempe cum, ut idem ait, aut ausos libertas sequetur, aut victi iidem erunt: aut ubi (ut Livius loquitur) *pax servientibus gravior quam liberis bellum*. Non si, ut apud Ciceronem est, appet futurum, ut, si victus eris, proscribas: si viceris, tamen servias.

Buet. c. 25.

Gell. xiii. 3.  
Val. Max. vii. 2.

IX. Alterum belli tempus, si, ita ut oportet, rem aestimanti, a jure, et quidem quod momenti sit maximi, simul stent vires. Hoc est, quod Augustus aiebat, bellum non suscipiendum, nisi cum major emolumenti spes quam damni metus ostenderetur. Et quod de prælio dicere solebant Scipio Africanus et L. Æmilius Paulus, idem huc non male aptaveris: non decertandum esse, *'nisi summa necessitudo aut summa occasio data esset*. Locum autem tum maxime hoc habebit,

*'Nisi summa necessitudo]* Plutar-chus *Gracchis*: τὸ δὲν τῆς ἐσχάτης ὀνάγκης ἐπιφέρειν σίδηρον, οὐτε λατρικὸν, οὐτε πολιτικὸν extra summam necessitatem ferrum inferre, nec boni medici est, nec boni presidii. (Pug. 845 A.) Marciani dictum apud Zonaram: μὴ δειν ὅταλα βασιλέα κινεῖν, ἂν εἰργνεύειν ἔξον non debere regem arma mouere, quādī pace frui liceat. (Lib. xiii. cap. 25. fin.) Augustinus L. epistola ad Bonifacium: *pacem habere voluntate* est: *bellum autem debet esse necessitatis, ut liberet Deus a necessitate et conservet in pace*. [Ubi legitur: Pa-

cem habere debet voluntas, bellum necessitas. Epist. xciv. vulg. 189. § 6. Ed. Benedictin.]

*\*Terror ac fama]* Leo *spernens tela dum se terrore solo tuerit, ac voluntate cogi testatur*. Habet id Plinius *Historie Naturalis* viii. cap. 16.

*\*Utique dolenda]* Lacedæmonii in oratione, quæ exstat apud Diodorum Siculum, libro xiii. (cap. 52) θεωροῦντες τὰς ἐν τῷ πολέμῳ φλογεισαὶς πολλὰ καὶ δεινὰ πάθη ποιοῦσας, οἴμεθα δεινὰ φανερὸν ποιῆσαι πᾶσι καὶ θεοῖς καὶ νύμφοις, δτι τούτων ἡκιστα πάρτων ἰσημένα αἴτιοι· cum videamus, ex

run into danger, when we have as much to fear if we sit still: so Aristides. This Tacitus puts, by saying that *A miserable peace is well changed for war*; where, as he also says, *Liberty may crown the attempt, and defeat will leave them no worse*. So Livy: but not when the pretence is as Cicero describes it; If you are conquered you are proscribed; if you are victorious you are a slave.

IX. Then only is the time for war, when we have right on our side, and, what is of the greatest consequence, strength also. This is what Augustus said, that war was not to be undertaken except when there could be shewn more hope of gain than fear of loss. What Scipio Africanus and Emilius Paulus said of a battle, may be ap-

cum spes est, "terrore ac fama, nullo aut exiguo periculo rem confici posse: quale erat Dionis consilium ad liberandas Syracusas. In epistolis Plinii est: *quod est pulcherrimum vicitoriarum genus, terrore perdomuit.*

X. 1 Sæva res bellum est, inquit Plutarchus, cumulumque secum trahit injuriarum et insolentiarum. Et sapienter Augustinus: *quorum malorum* (de his loquitur, quæ ex bello nascuntur) *multas et multiplices clades, diras et duras necessitates, si, ut dignum est, eloqui velim, quamquam nequam, sicut res postulat, possum, quis erit prolixæ disputationis modus?* sed sapiens, inquiunt, justa bella gesturus est: *quasi non, si se hominem meminit, multo magis dolebit justorum necessitatem sibi extitisse bellorum: quia nisi justa essent, ei gerenda non essent: ac per hoc sapienti nulla bella essent.* Iniquitas enim partis adversæ justa bella ingerit gerenda sapienti, imo et necessaria: *quæ iniquitas homini utique dolenda, quia hominum est, et si nulla ex eo bellandi necessitas nascatur.* Hæc itaque mala

bello plurimas inimicitiæ, plurima atrocitas oriri, nostri officii duximus cunctis Diis hominibusque testatum facere, causam horum a nobis non esse. Plutarchus Numa, (pag. 78 B.) τι οὖν, φύσει τις, οὖν ἐτί τὸ βέλτιον προῆλθεν ή 'Ρώμη τοῖς πολέοις; ἐρωτῶν ἐρώτημα μακράς ἀποκρίσεως δεόμενον, πρὸς αὐθούσους τὸ βέλτιον ἐπλόντω, καὶ τροφῇ, καὶ ἡγεμονίᾳ, μᾶλλον ἢ σωτηρίᾳ καὶ πρόστητι καὶ τῷ μετὰ δικαιοσύνης αὐταρκείᾳ τιθεμένοντες hic si quis mihi dixerit, nonne Roma per bella prosecutum, questionem moverit longa responsionis egenem, apud homines, qui

projectum ponunt in opulentia, in deliciis, in imperiis militaribus, non in salute populi, in lenitate, in justitia suo contenta. Stephanus medicus Chosroï Persarum regi apud Procopium Persorum II. οὐκοῦν, ὃ κράτιστε βασιλεὺς, φόνους σοι καὶ μάχας ἐργαζομένῳ καὶ πόλεων αὐτραποδισμόῳ, τῶν μὲν ἀλλων ἵστω δυνάτων παρέσται τυχεῖν. τὸ δὲ ἀγαθὸν εἶναι δοκεῖ, οὐ μήποτε ἔσται: tibi, rex maxime, in cædibus et pugnis et urbibus subligendis occupato alia fortis nomina contingent, bonus autem ut per hæc credaris, fieri nequit. (Cap. 26.) Adde locum egregium

plied to war in general; that *We ought never to fight except there were either the greatest necessity or the greatest occasion.* And this is especially true, when there is a hope that the matter may be brought to an issue merely by terror and by the reputation of strength, with little or no danger. Pliny says, *He gained the most brilliant kind of victory, conquering by terror.*

X. 1 War, says Plutarch, is a dire business, and brings with it an accumulation of injuries and cruelty. And Augustine says wisely, that this being so, the wise man will not be satisfied merely if the war is just; he will grieve that there should be a necessity for just wars; since, except they were just, he would not go to war; and in

Diod. xvi. 17.  
Lib. II. Ep. 7.

Vit. Camilli.  
p. 134 a.

De Civ. Det.  
xix. 7.

*tam magna, tam horrenda, tam sæva quisquis cum dolore considerat, miseriam necesse est fateatur: quisquis autem vel patitur ea sine animi dolore, vel cogitat, multo utique miserius ideo se putat beatum, quod et humanum perdidit sensum.* Idem alio loco: *belligerare malis videtur felicitas, bonis necessitas.* Maximus autem Tyrius: *τῆς τοῦ πολεμεῖν χρείας καν αφέλης τὸ ἀδίκον, ἐλεεινὸν αὐτῆς τὸ ἀναγκαῖον· de bello etiamsi demas injustitiam, ipsa per se necessitas miseranda est.* Idem: *φαίνεται ο πόλεμος τοῖς μὲν δικαίοις ἀναγκαῖος ὡν, τοῖς δὲ ἀδίκοις ἐκούσιος· appetat bellum a justis non sumi nisi necessario, ab injustis sponte.*

Lib. iv. de  
Civ. Del. c.  
15.  
Dissert. 14.  
p. 146.

**2** Cui Senecæ illud addendum, non esse homini homine prodige utendum. Philiscus Alexandrum monebat, ut gloriæ quidem studeret, sed ea lege, ne se pestilentiam aut magnum

Guicciardini libro xvi. (in Oratione Episcopi Osim.)

**3** *Quod multum sanguinem fidisset]* Οὐκ ἔπιτρέπει δὲ τολλοὺς τολέμους ήγεινισμένα καὶ φόνῳ τῶν ἐχθρῶν μεμασμένων non permisit templum struere ei qui multa bella bellasset, pollutusque erest, hostili quidem, attamen sanguine. Verba sunt Josephi libro vii. cap. 4.

ubi et plura in hanc sententiam sequuntur. Plinius libro vii. cap. 25. post relata Cæsaris Dictatoris prælia: *non equidem in gloria posuerim tantam etiam coactam humani generis injuriam.* Philo de Vita Mosis: καὶ γὰρ εἰ νόμοιοι αἱ κατ' ἐχθρῶν σφαγαὶ, διλλ' ὅγε κτεινον ἀνθρώπους, εἰ καὶ δικαῖοις καὶ ἀμυνόμενος καὶ βιασθεῖς, ὑπαίτιος εἴναι

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this very way, there would be no wars. The iniquity of men may make wars just, and even necessary; but this iniquity is a thing to be lamented, even if it did not lead to war. Whoever considers the evils of war, must confess the miseries of the case; who suffers it without grief, is more miserable in his joy, because he has lost the sense of humanity. And in another place, *The bad think war a pleasure, the good, a necessity.* So Maximus Tyrius.

**2** To which we must add what Seneca says, that man is not to use man prodigally. Philiscus admonished Alexander, that he might consult his glory, but on condition that he did not make himself a pestilence or a plague: meaning that he must not bring about the destruction of populations and the desolation of cities, such as a pestilence produces: while nothing more becomes a king, than to provide for the safety of all, as peace does provide.

**3** When we consider that by the Hebrew law he who had slain a man, even without intending it, was obliged to fly; that God forbade his temple to be built by David, who is related to have carried on pious wars, because he had shed much blood; that even among the ancient Greeks, those who had stained their hands with man-

morbum faceret: intelligens populorum occidionem, desolationem urbium, pestilentiae esse opera: nihil autem magis esse regium quam consulere omnium saluti, quæ pace continetur.

3 Si jure Hebræo et qui non volens hominem occidisset <sup>Num. xxxv.</sup>  
fugere debebat: si Deus a Davide, qui pia bella gessisse <sup>Deut. lxx.</sup>  
dicitur, ideo templum suum ædificari vetuit <sup>1 Chron.</sup> <sup>xxviii. 3.</sup> quod multum  
sanguinem fudisset: si apud Græcos veteres expiatione opus  
habebant etiam qui sine culpa manum cæde maculassent: quis non videat, præsertim Christianus, quam res sit infelix et  
mali ominis, quantoque nisu fugiendum bellum etiam non in-  
justum? Certe apud Græcos Christianismum professos diu  
observatus est canon, quo sacris <sup>\*ad tempus</sup> arcebantur qui <sup>Basil. ad</sup>  
hostem in qualcumque bello interfecissent. <sup>Ampel.</sup> <sup>Epist. 1. 12.</sup>

δοκεῖ διὰ τὴν δυνατάτω καὶ κοινῆν συγ-  
γένειαν· οὐ χριν καθαροῖς ἐδέησε  
τοῖς κτείνασι πρὸς ἀπαλλαγὴν τοῦ  
νομισθέντος ἄγους γεγενῆσθαι· quam-  
vis enim legibus permisere sint hostium  
occidiones, attamen quisquis hominem  
interfecerit, quamvis juste, quamvis ad  
sui tutelam, quamvis coactus, aliquid  
labis contraxisse creditur, propter illam

communem a summa causa verientem  
cognitionem. Quapropter et purgatione  
quadam opus habebant tales interfec-  
tores, ad eluendum quod commissum vide-  
batur piaculum. (Pag. 650 e.)

\* Ad tempus] Triennio. Zonaras Ni-  
cephoro Phoca. (Lib. xvi. cap. xxv.  
pag. 203. Tom. II. Ed. Reg.)

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slaughter, even without fault, had need of expiation; how can any one fail to see, especially any Christian, what an unhappy and disastrous thing, and how strenuously to be avoided, is a war, even when not unjust? Certainly among the Greeks who professed Christianity, the Canon was long observed, by which those who had killed an enemy in any war whatever, were for a time excluded from participation in sacred offices.

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## CAPUT XXV.

### DE CAUSIS BELLI PRO ALIIS SUSCIPIENDI.

- I. *Bellum suscipi juste pro subditis :*
- II. *Non semper tamen suscipiendum.*
- III. *An subditus innocens hosti dedi possit, ut periculum vitetur.*
- IV. *Bella item justi suscipi pro federatis aequalibus et iniquilibus.*
- V. *Et pro amicis :*
- VI. *Imo et pro hominibus quibusvis :*
- VII. *Posse tamen id sine peccato omitti, si quis aut sibi metuat, aut etiam nocentis vita.*
- VIII. *An pro subditis alienis defendendis justum sit bellum, distinctione explicatur.*
- IX. *Injustas esse societates et mercenariam militiam sine causarum discrimine.*
- X. *Etiam praeципue praeda aut stipendiū causa militare vitiosum esse.*

Lib. I. 5. I. 1 **S**UPRA cum de his, qui bellum gerunt, egimus, dic-tum ostensemque a nobis est, naturaliter non tan-tum unumquemque sui juris esse executorem, sed et alieni : quare quae cause justae sunt ipsi, cuius res agitur, eadem justae sunt iis, qui aliis opem ferant<sup>1</sup>.

Navar. xxiv. 2 Prima autem maximeque necessaria cura <sup>a</sup>pro subditis,

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<sup>1</sup> Confer PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. VIII. cap. vi. § 14. J. B.

<sup>a</sup> *Pro subditis]* Procopius Persico-rum II. οὐ γάρ δ μηδὲν αὐτὸς ἀδικεῖ δίκαιος, εἰ μὴ καὶ τοὺς ὑφ' ἔτέρων ἀδι-

### CHAPTER XXV. Of the causes of undertaking War on the account of others.

I. 1 When we above spoke of those who make war, it was said and proved by us that, by Natural Law, not only each person has an executive power to assert his own right, but also the rights of others. Whence it follows, that the causes which justify him whose interest is concerned, do also justify those who help him.

2 The first and closest of such relations is, the care which we are bound to exercise for those who are under us, whether as members of a family or of our civil community ; for these are, in a way, a part of him who is at the head of the body, as we there said. Thus the Gibeonites having put themselves under the Jewish people, that people took up arms for them, with Joshua for their leader. Our ancestors, says Cicero, often undertook war, because merchants and sailors belonging to them were treated with injury. And elsewhere, How many wars did our ancestors undertake because Roman citizens

sive qui familiari, sive qui civili subsunt imperio; sunt enim quasi pars rectoris, ut ibidem diximus. Sic pro Gabaonitis, qui se populo Hebraeo subjecerant, arma sumvit is populus, duce *Josua*. *Majores nostri*, inquit Cicero ad Quirites, *sæpe, mercatoribus ac naviculariis injuriosius tractatis, bella gesserunt*. Alibi: *quot bella majores nostri suscepérunt, quod cives Romani iuria affecti, naviculariis retenti, mercatores spoliati esse dicerentur?* Iidem Romani pro quibus sociis arma sumere noluerant, pro iis deditis, id est factis subditis, eadem sumere necessarium duxerunt. Campani ad Romanos: *quandoquidem nostra tueri adversus vim atque iuriam justa vi non vultis, vestra certe defendetis*. Florus a Campanis fedus, quod ante habebant, sanctius ait factum omnium suorum ditione. *Fides agi visa*, inquit Livius, *deditos non prodi*.

II. Non tamen semper, quamvis justa causa subditi aliquujus obligat rectores ad bella sumenda: sed ita demum, si id sine omnium aut plurium subditorum incommodo fieri potest. Rectoris enim officium magis circa totum quam circa partes versatur: et quo pars est major, eo ad totius naturam propius accedit.

III. 1 Itaque, si civis unus, quamvis innocens, ad exitium

*κομένους ἔχων ἐν ἀξονια πόνοθαι πέφυκεν* neque enim statim justus est, qui *injuriam nulli facit, nisi et eo sit animo,* ut tutetur sibi commissos adversus alienas iurias. (Cap. 15.)

were injured, their navigators detained, their merchants despoiled! The same Romans, though they would not take up arms for their allies, yet when the same peoples had become their subjects, thought it necessary to do so. The Campanians say to the Romans, Since you will not allow us to defend our property against force and injury by our own just force, you will certainly defend it by yours. Florus, as ambassador of the Campanians, says that the league which existed before had become more sacred by the surrender of all his countrymen. It was considered a point of good faith, says Livy, not to desert those who had surrendered to us.

II. But yet it is not always, even if the cause of a subject be just, that it obliges the rulers to enter upon a war; but then only, if it can be done without the damage of all, or the greater part, of the subjects. For the office of the ruler is concerned more with the whole than with the parts; and in proportion as the part is greater, it approaches nearer to the nature of the whole.

III. 1 Therefore if one citizen, though innocent, be demanded by

*Jos. x. 6.*

*Orat. pro Leg. Man.*

*c. 5.*

*Verr. v. 88.*

*Apud Liv. vii. 31.*

*Lib. i. 16.*

*n. 2.*

*Lib. vii. 31.*

*Sotus de Just. et Jur. l. v. q. 1. art. 7.* <sup>b</sup>dubium non est, quin deserri possit, si appareat, civitatem hostium viribus multo esse imparem.

*Lib. i. contr. s. c. 13.* <sup>a</sup>Disputat contra hanc sententiam Ferdinandus Vasquius: sed, si non tam verba ejus, quam propositum spectetur, hoc videtur agere, ne civis talis temere deseratur, ubi eum defendi posse spes sit. Nam et historiam adfert Italici peditatus, qui Pompeium rebus nondum plane desperatis deseruit, de sua salute certior factus a Cæsare; quod ille non immerito improbat.

*App. Alex. Bell. Civ. ii. p. 478.*

2 An vero etiam tradi in manus hostium possit civis innocens, ut vitetur imminens alioqui civitatis excidium, disputant eruditii, et olim disputatum est, ut cum Demosthenes nobilem illam de canibus, quos lupi pacis causa ab ovibus tradi sibi postulabant, fabulam protulit. Negant id licere non Vasquius tantum, sed is, cuius sententia ut perfidiæ propinquæ a Vasquio arguitur, Sotus. Ponit tamen Sotus, teneri talem civem se hostibus tradere: hoc quoque negat Vasquius, quia natura societatis civilis, quam sui quisque commodi causa iniit, id non postulet.

<sup>b</sup> *Dubium non est, quin deserri possit]* Vide consilium Nicephori Patriarchæ datum Michaeli Rangabæ de transfugis pacis causa reddendis Bulgarorum duci, ubi hec verba apud Zonaram: κρείσσον εἶναι παθεῖν κρίσοντες μετρίους τινάς, η πλήθη πάσχειν δυνάμεα' satius judi-

cemus esse, paucos aliquos mala ferre quam immensam multitudinem. (Lib. xv. cap. xvii. pag. 127.)

<sup>a</sup> *Vide PUFENDORFIUM, De Jure Nat. et Gent. Lib. viii. cap. ii. § 6. J. B.*

<sup>c</sup> At vero hoc casu incertum satia

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the many, in order to be put to death, it is not doubtful that he may be given up\*, if it appear that the state of which the demand is made is much too weak to contend. Vasquius disputes against this opinion; but if we look, not so much at his words, as at his purport, he seems to come to this, that such a citizen is not lightly to be deserted, when there is a hope that he may be defended. For he adduces the history of the Italic infantry, which deserted Pompey when his cause was not yet desperate, being assured of their safety by Caesar; which he blames, and deservedly.

2 Whether an innocent citizen may be delivered into the hands

▼ \* This is an example of the evil of laying down rules for cases of necessity. If a city under the terror of destruction from a cruel enemy, should give up an innocent person to death, we might excuse them when the thing was done; but we can hardly look upon it as a speculative opinion which they may morally hold beforehand, that men are right in doing so. The certainty of saving themselves by such means must be doubtful, as Barbeyrac says: and no protest could be strong enough to express the horror which the Rulers of a State ought to feel towards such a step. W. W.

3 Sed hinc nihil aliud sequitur, quam ex jure proprie dicto civem ad hoc non teneri: at non etiam caritatem pati, ut aliter faciat. Multa enim sunt non justitiae propriæ dictæ sed dilectionis officia, quæ non tantum cum laude præstantur, quod Vasquius agnoscit, sed etiam omitti sine culpa nequeunt. Tale autem omnino hoc videtur esse,<sup>3</sup> ut maximæ multitudinis innocentis vitam suæ unius quis præferat. Praxithea in Euripidis *Erechtheo* (vers. 32, et seqq.):

Εἴπερ γάρ ἀριθμὸν οἴδα καὶ τοὐλάσσονος  
Τὸ μεῖζον, εἰς μὲν οἶκος οὐ πλέον σθένει,  
Πταισας ἀπάσης πόλεος, οὐδὲ ἵστον φέρει.

Si namque numeros, quidque sit plus aut minus,  
Percipimus animo, <sup>c</sup>non malo unius domus  
Commune vinci, sed nec æquari potest.

Atque ita Phocion Demosthenem atque alios hortabatur ad <sup>Diod. xvii. 15.</sup> exemplum Leï filiarum et <sup>d</sup>Hyacinthidum potius mortem ipsi subirent, quam malum irreparabile patriæ inferri sinerent. Cicero pro P. Sextio: *si mihi in aliqua nave cum meis amicis naviganti hoc accidisset, ut multi ex multis locis predo-*

*est, an unius illius periculo salva futura sit multitudo. Plura diximus in Notis nostris Gallicis. J. B.*

<sup>c</sup> Non malo unius domus  
Commune vinci, sed nec æquari potest]

Οὐ δίκαιον προσθῆκην τὸ ὅλον μέρους

*εἶναι iniquum est, totum fieri accessio-  
nem partis. Locus est apud Philonem  
fine libri i. de Vita Mosis, ubi et alia  
lectu dignissima. (Pag. 652.)*

<sup>d</sup> *Hyacinthidum* Vide Apollodorum  
in bibliotheca. (Lib. iii. cap. xiv. n. 8.)

of the enemy to avoid the otherwise imminent destruction of the city, the learned dispute, and the dispute existed also in ancient times; as when Demosthenes narrated the clever fable of the wolves requiring the sheep to give up their dogs for the sake of peace. That it is not lawful to do so, is maintained not by Vasquius only, but Sotus also, whose opinion Vasquius condemns as approaching to perfidy. Yet Sotus holds that such a citizen is bound to surrender himself to the enemy: this Vasquius denies, because the nature of civil society which every one enters into for his own advantage, does not require such a step.

3 But from this, nothing follows but that a citizen is not bound to this step, by any law properly so called; but it does not follow that charity allows him to do otherwise. For there are many duties, not of justice properly so called, but of good will, which it is not only laudable to perform, but which it is blameable to omit. And of such nature appears this to be, that each person should prefer the life of an innocent multitude to his own. So Euripides. And so Phocion exhorted Demosthenes and others that they should rather

Cap. 19.

Lib. xiv. 22.

*nes classibus eam navem se oppressuros minarentur, nisi me unum sibi dedidissent: si id vectores negarent, ac mecum simul interire, quam me hostibus tradere mallent: jecisset me potius ipse in profundum; ut ceteros conservarem, quam illos mei tam cupidos non modo ad certam mortem, sed in magnum vitæ discrimen adducerem.* Idem de Finibus lib. viii. 11: *Vir bonus et sapiens, et legibus parens, et civilis officii non ignarus, utilitati omnium plus quam unius alij cuius aut suæ consulit.* Apud Livium de Molossis quibusdam dictum legimus: *equidem pro patria, qui lethum oppetissent, saepe fando audivi: qui patriam pro se perire æquum censerent, hi primi inventi sunt.*

4 Sed, hoc posito, restat dubitatio, an, quod ille facere tenetur, ad hoc cogi quoque possit. Negat hoc Sotus exemplo divitis qui egeno stipem dare ex misericordiae præscripto tenetur, cogi tamen nequit. Sed notandum est, aliam esse rationem partium inter se, aliam superiorum, ubi cum sibi sub-

• *Etiam ad alia, que virtus qualibet præcipit]* Sic apud Lucanos pena erat dicta prodigis, ingratis apud Macedonas, otiosis apud eosdem Lucanos et Athenienses: adde quæ allata ad libri i. cap. i. § 9.

<sup>1</sup> *Ad bella, quibus justa causa non subiit]* Vide Simlerum de Republica

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submit to death, after the example of the daughters of Leos and the Hyacinthids, than bring an irreparable calamity on their country. Cicero, pleading for Sextius, says, that if he were in a ship attacked by pirates who demanded him in particular, and would destroy the ship if he were not given up, he would rather throw himself into the sea than bring upon all the rest, not only certain death, but even extreme danger of death. And again, he says that a wise and good man will rather consult the safety of all than of any one in particular, even of himself. In Livy we read: I have often heard of men who would die for their country, but I never heard of any who thought it reasonable that their country should perish for them.

4 But, this being assumed, there remains this doubt, whether, what they are thus bound to do, they can be compelled to do. Sotus denies this, adducing the example of a rich man who is bound to give alms to a needy man by the rule of mercy, but cannot be compelled to do so. But it is to be remarked that the relation of such parties is different from that of superiors compared with subjects. For an equal cannot compel an equal, except to that which he has a right to, speaking strictly. But a superior can compel him to other things also which any virtue prescribes; because in the peculiar right of a superior as superior, this is comprehended. Thus in a great scarcity of

ditis comparantur. Nam par parem cogere non potest, nisi ad id quod ex jure debetur stricte dicto. At superior cogere potest <sup>etiam</sup> ad alia, quæ virtus quælibet præcipit, quia in jure proprio superioris, qua superior est, hoc est comprehensum. Sic in magna frumenti penuria cives cogi possunt, <sup>Lea. II. 2.</sup>  
<sup>dub. 7.</sup>

quod habent, in medium conferre: quare et in nostra illa controversia verius videtur, cogi posse civem, ut id faciat, quod exigit caritas. Atque ita is quem dixi Phocion amicissimum quandam sibi Nicoclem nomine demonstrans aiebat, <sup>Plutarch. in Phocion. p. 749 c.</sup> <sup>De Offic. I. 36.</sup> huc malorum ventum, ut si Alexander eum deposceret, ipse dedendum censeret.

IV. Subditis proximi, imo pares sunt in hoc, ut defendi debeant socii, in quorum federe comprehensum id est, sive in tutelam sese et fidem aliorum dederunt, sive mutua auxilia pacti sunt. *Qui non repellit injuriam a socio, si potest, tam est in vizio, quam ille qui facit,* ait Ambrosius.

Pactiones autem tales <sup>ad bella,</sup> quibus justa causa non subsit, porrigi

*Helvetiorum* [pag. 160. Edit. Elzevir.] *Domino guerram faciente alicui, si sciat, quod juste, aut cum dubitabitur, vasallus eum adjuvare tenetur. Sed cum palam est, quod irrationaliter* *eam facit, adjuvet eum ad ejus defensionem, ad offendendum vero alium non adjuvet.* Lib. II. de Feudis Tit. 28. *Hic finitur.* [Vide supra c. 15, § 13, M. T.]

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corn, the citizens may be compelled to contribute to the common stock what each one has; and thus, in this question before us, it seems to be sound doctrine that the citizen may be compelled to do that which charity requires\*. And thus Phocion, whom I have already mentioned, pointed out a very intimate friend of his, Nicocles by name, and said that matters were come to such a miserable condition that if Alexander demanded him, he would be of opinion that he ought to be given up.

IV. As parties whom we are bound to defend, next to our subjects, come our allies. This is comprehended in our engagement with them, whether they have put themselves under the authority and protection of others, or have contracted for mutual aid. *He who does not repel an injury for an ally, if he can, is in the wrong as much as he who does the injury,* says Ambrose. That such contracts are not to be extended to wars, where there is no just cause for the war, we have elsewhere said. And this is the reason why the Lacedæmonians

\* It is quite extravagant to place the sacrifice of one's own life on a level with other offices of charity. As Grotius himself has just said, (chap. xxiv. 6.) life is the foundation of all enjoyment in this world, and the occasion of all the happiness of another: and it must be only under peculiar circumstances that a man can dispose of these possessions, as if they resembled other possessions. W.

haud posse diximus alibi. Et hæc est causa, cur Lacedæmonii, priusquam bellum in Athenienses susciperent, sociis omnibus de cause justitia judicium permiserint: et Romani Græcis de bello in Nabidem. Nunc illud addamus, ne tunc quidem teneri socium, si nulla spes sit boni exitus. Boni enim, non mali causa societas contrahitur. Defendantus autem socius est etiam contra alium itidem federatum, nisi priori federe aliquid specialius convenerit. Sic Corcyreos, si causa eorum justa erat, Athenienses defendere potuerunt etiam contra Corinthios socios vetustiores.

*Vide supra,*  
c. 16. § 13.  
n. 2.

*Vict. de Ind.*  
p. 2. n. 17.  
*Cajet. 2. 2.*  
q. 4. art. 1.

V. <sup>5</sup>Tertia causa est amicorum, quibus auxilium promissum quidem non est, sed tamen amicitiae quadam ratione debetur, si facile et sine incommode exhiberi possit. Sic pro Lothro cognato arma summis Abrahamus: Antiatibus <sup>4</sup>præceperunt Romani, ne in Græcos, utpote Italorum cognatos, piraticam exercerent. Iidem sœpe non pro sociis tantum, quibus ex federe id debebatur, sed pro amicis bella suscepérunt, aut suscipere minati sunt.

VI. Postrema latissimeque patens est, hominum inter se

<sup>5</sup> Tertia causa est amicorum] Oratione vetus, [apud AELIANUM, Var. Hist. III. 44.]

λαθρὶ φλάφη θνήσκοντι παρὰν πέλας οὐκ ἐβοήθεις.

Οὐ σε θεμιστεῖνον. περικαλλός ἔξιθι ναοῦ.  
Non ope juvisti presens in morte so-  
dalem:

Effabor tibi nil, nisi, Tempili finibus exti-

nians, before they began their war with the Athenians, put the matter to the judgment of all their allies; as also the Romans did with regard to the Greeks, respecting the war with Nabis. We will further add, that even in such a case, the ally is not bound, if there be no hope of a good result. For such alliances are contracted, not for the sake of evil results, but of good. An ally however is to be defended even against another confederate, except there be some special stipulation to the contrary in some previous convention. Thus the Corcyreans, if their cause was good, might have received defensive aid from the Athenians, even against the Corinthians, who were their old allies.

V. The third cause [in which we may undertake war on account of others, subjects and allies being the first two cases,] is the cause of friends, to whom we have not promised aid, but to whom it is in a manner due on the ground of friendship, if it can be given easily and without inconvenience. Thus Abraham took arms for Lot, his relative; the Romans commanded the Antiates not to exercise piracy against the Greeks, as being related to the Italians. The Romans too, often

conjunctio, quæ vel sola ad opem ferendam sufficit. *Homo in Cie. de Fis.  
adjutorium mutuum generatus est*, ait Seneca. Ejusdem est: *Sapiens, quoties poterit, fortunæ intercedet.* Euripides in *Supplicibus* (vers. 267, et seqq.):

*III. de Offic. II.  
L. utrvm, 3.  
D. de Just. et  
Jur.  
De Ira, I. 5.  
De Clem. II.  
16.*

Præbent saxa perfugium feris,  
Aræque famulis, urbibus pressis malo  
Tutamen urbes.

Ambrosio *fortitudo, quæ defendit infirmos, plena justitia* *De Offic. I. 27.*  
*est: qua de re supra quoque egimus.* *Lib. I. 5.*

VII. 1 Quæritur hic, an teneatur etiam homo hominem, populus populum ab injuria defendere. <sup>b</sup>Plato puniendum censem, qui vim alteri illatam non arcet: quod et *Ægyptiorum* legibus cavebatur. Sed primum, si manifestum sit periculum, non teneri certum est: potest enim suam vitam et res alienis præferre. Atque ita interpretandum censeo illud Tullii, *qui non defendit, nec obſtit, si potest, injuriæ, tam est in vitio, quam si parentes, aut patriam, aut socios deserat: ut potest illud intelligamus, cum suo commodo: nam et idem alibi dicit, non defendi homines sine vituperatione fortasse possunt.* *Apud Amm. Marc. xxx. 4. p. 643.*

<sup>a</sup> Habet hoc Auctor e STRABONE, *Geogr.* Lib. v. sed rem non satis adcurate narrat. Inspice, si lubet, locum, pag. 354, 355. Edit. Paris. Casaubon. *J. B.*

<sup>b</sup> Plato puniendum censem, qui vim alteri illatam non arcet] Et Hebræi, Moses de Kotzi præcepto jubente LXXVII. LXXX. vetante CLXIV. CLXV.

took up arms for their allies, not only when they were bound to do so by treaty, but also for their friends; or threatened to take up arms in such cases.

VI. The last and widest reason for taking up arms, is the connexion of men with men as such, which alone is often sufficient to induce them to give their aid. *Men are made for mutual help*, says Seneca, and the like; so Euripides and Ambroso.

VII. 1 Here the question is raised, whether man be bound to defend man, and people to defend people, from wrong. Plato thinks that he ought to be punished who does not repel force offered to another; and this was also provided by the laws of the Egyptians. But, in the first place, if the danger be manifest, it is certain that he is not so bound; for he may reasonably prefer his own life and possessions to those of others. And in this sense, as I conceive, we are to interpret what Cicero says, that *he who does not repel and resist an injury when he can, is as much in fault as if he were to desert his parents, or his country, or his allies: when he can, we are to understand, with convenience to himself: for the same writer elsewhere says, Per-*

*Fragn. iv. 2. Apud Sallustium est in historiis: omnes, qui secundis rebus suis ad bellum societatem orantur, considerare debent, liceatne tum pacem agere; dein, quod queritur, satisne pium, tutum, gloriosum, an indecorum sit.*

[Lem. II. 4.  
dub. 15.]

[[II. 1. 9.]]

2 <sup>1</sup> Senecæ quoque hoc non spernendum: *succurram perituro, sed ut ipse non peream, nisi si futurus ero magni hominis aut magna rei merces.* Sed ne tunc quidem tenebitur, si oppressus nisi morte invasoris eripi non potest. Nam si invasoris vitam, qui invaditur, suæ potest præferre, ut alibi diximus, non peccabit, qui invasum id aut credet, aut volet malle: præsertim cum ex parte invasoris majus sit periculum damni irreparabilis et sempiterni.

VIII. 1 Est et illud controversum, an justa sit belli causa pro subditis alienis, ut ab eis arceatur imperantis injuria. Sane ex quo civiles societates institutæ sunt, certum est, rectoribus cujusque speciale quoddam in suos jus quæsitus. Euripides *Heraclidis* (vers. 143, 144):

Δίκαιοι δὲ ἐστὶν οἰκοῦντες πόλεων  
Ἄντοι καθ' αὐτοὺς κυρίους κράτειν δίκας.

Nos, quotquot hujus colimus urbis moenia,  
Sufficimus ipsi nostra judicia exsequi.

<sup>1</sup> *Seneca quoque]* Locus est de *Beneficiis* II. 15. alter non dissimilis ejusdem argumenti Lib. I. cap. 10. *Dignum etiam impendit sanguinis mei tuebor, et in partem discriminis veniam: indignum, si eripere latronibus potero clamore sub-* *lato, salutarem vocem homini non pigebit emittere.* Vide que supra libro II. cap. I. § 8.

<sup>k</sup> *Rescindero nunquam  
Dis licet acta Deum.]*  
Eiusdem est III. *Metamorph.* (vers. 336):

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*haps we cannot defend men without incurring blame. So Sallust says that when we are asked to assist allies, it is to be considered whether we may abstain from war; and then, whether what is required is sufficiently pious, safe, glorious; or on the other hand, unbecoming.*

2 And the warning of Seneca is not to be despised: *I am willing to help a man who is perishing, but so that I myself do not perish; except I am to be the ransom of a great man or a great cause.* And even then, he will not be bound, if the person oppressed cannot be extricated without the death of the assailant. For if he may in some cases prefer the life of the assailant to his own, when he is attacked, as we have elsewhere said, he will not be wrong who either thinks or desires that another person so attacked has the same preference: especially when there is a greater danger of irreparable and eternal loss on the part of the invader.

VIII. 1 There is also another question, Whether a war for the

Nec alio illud pertinet :

Spartam, tibi quæ contigit, orna :  
Nobis fuerint cura Mycenæ.

*Frag. Phanti-*  
*cis Kuripid.*  
v. 19, 20.

Et Thucydides inter summi imperii signa posuit τὸ αὐτόδικον, Lib. v. 18.  
judiciorum summam potestatem, non minus quam τὸ αὐτό-  
νομον καὶ τὸ αὐτοτελὲς, id est, legum et magistratum  
creandorum jus. Nec alio pertinet poëticum illud :

Non illi imperium pelagi regnumque tridentis,  
Sed mihi sorte datum.

*Virg. Aen. I.*  
v. 142.

Et huic non dissimile illud :

Rescindere numquam  
Dis licet acta Deum.

*Ovid. Met.*  
xiv. v. 784.

Et apud Euripidem :

Mos ille est Deum ;  
Quod cupit unus, huic nefas obsistere :

*Hippolyt.*  
v. 132.

Nimirum, ut recte explicat Ambrosius : ne, usurpata alia-  
rum partium sollicitudine, bellum inter se incitarent : τοὺς  
σφετέρους αὐτὸν τίνα κολάζειν, <sup>1</sup>ut in suos quisque animad-  
vertant, æquum esse censem Corinthii apud Thucydidem. Lib. I. 43.  
Et Perseus in oratione ad Martium, quod in Dolopes fecisset,  
negat se defensurum : jure, inquiens, feci meo, cum mei regni, Liv. xlvi. 41.

Neque enim licet irrita cuiquam  
Facta Dei fecisse Deo.

<sup>1</sup> Ut in suos quisque animadvertant]  
Augustinus II. de Libero Arbitrio : non  
enim, ut alicujus est bonitatis, alienis  
prestare beneficia, ita justitia, vindicare  
in alienos. (Cap. 1.) Procopius Van-

dalicorum 1. τὴν ἵπαρχουσαν ἡγεμονίαν  
αὐτὸν τίνα διοικεῖσθαι καλὸν, καὶ μὴ  
ἄλλοτρας οἰκειοῦσθαι φροντίδας· quod  
cuique obtigit imperium, id ut adminis-  
tret, ac ne alienas curas in se trahat,  
honesto convenit. (Cap. 9.)

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subjects of another be just, for the purpose of defending them from injuries inflicted by their ruler. Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some especial right over his own subjects. Euripides makes his characters say that they are sufficient to right wrongs in their own city. And Thucydides puts among the marks of empire, the supreme authority in judicial proceedings. And so Virgil, Ovid, and Euripides in the *Hippolytus*. This is, as Ambrose says, that *peoples may not run into wars by usurping the care for those who do not belong to them*. The Corinthians in Thucydides say that it is right that each state should punish its own subjects. And Perseus says that he will not plead in defense of what he did against the Dolopians, since they were under his authority and he had acted upon his right. But all this applies when the subjects have really violated their duty; and we may add, when

*Vict. Rel. de  
Ind. n. 15.*

*meæ ditionis essent.* Sed hæc omnia locum habent, ubi vere delinquent subditi, adde etiam, ubi dubia est causa. In hoc enim instituta est illa imperiorum distributio.

*Vict. Rel. de  
Ind. p. 2 n.  
13.*

2 At non etiam, si manifesta sit injuria, si quis Busiris, Phalaris, Thrax Diomedes ea in subditos exerceat, quæ sequo nulli probentur, ideo præclusum erit jus humanæ societatis. Sic in Maxentium et in Licinium Constantinus, <sup>m</sup>in Persas alii Romanorum Imperatores arma cuperunt, aut capere minati sunt, nisi vim a Christianis religionis nomine arcerent.

3 Imo etiam si daretur, ne in summa quidem necessitate arma recte a subditis sumi (qua de re dubitare vidimus illos ipsos, quorum institutum fuit regiam potestatem defendere) non tamen inde sequetur, non posse pro ipsis ab aliis arma sumi. Quoties enim actioni alicui impedimentum ponitur personale, non ex re; toties quod uni non licet, alteri pro eodem licere potest, si modo tale sit negotium, in quo alter alteri prodesse possit. Sic pro pupillo, cuius persona judicium non capit, litigat tutor aut alias: pro absente etiam sine mandato

<sup>m</sup> *In Persas alii Romanorum Imperatores]* Exemplum simile habes in rebus Pipini apud Fredegarium in fine.

<sup>n</sup> Videtur hec, in omnibus Editionibus, excidisse vox subditorum, quam series orationis postulat. *J. B.*

<sup>o</sup> Adludit forte Auctor ad illud QUINTILLANI: *Non fabricetur Militi gladius: potest uti eodem ferre Latro. Inst. Orat. Lib. II. cap. 16 [§ 6]. J. B.*  
<sup>p</sup> *Ut in quodvis bellum nullo cause discrimine promittantur auxilia]* Iterum

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the case is doubtful. For that distribution of power was introduced for that case.

2 But the case is different if the wrong be manifest. If a tyrant like Busiris, Phalaris, Diomede of Thrace, practises atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case. So Constantine took arms against Maxentius and Licinius; and several of the Roman emperors took or threatened to take arms against the Persians, except they prevented the Christians being persecuted on account of their religion.

3 But if we should grant that subjects cannot rightly take up arms even in extreme necessity, (which, we have seen, has been doubted even by those whose purpose was to defend the royal power,) it would not follow that others may not take up arms for them. For when the impediment which exists to an action is in the person, not in the thing itself; in such cases, what is not lawful to one person may be lawful to another for him, if it be a case in which one can help another. Thus for a ward or minor, who is not capable of legal acts, the guardian or trustee sustains the suit; and for an absent person, an agent

defensor. Impedimentum autem quod resistere subditum prohibet, non ex causa venit quæ eadem est in subdito et in non subdito, sed ex personæ qualitate, quæ in alios non transit.

4 Sic Seneca existimat bello a me peti posse, qui a mea gente sepositus suam exagitat, ut diximus, cum de penis exposcendis ageretur: quæ res sæpe cum defensione <sup>De Benef.</sup> <sub>vii. 19.</sub> innocentium conjuncta est. Scimus quidem ex veteribus novisque historiis, alieni cupiditatem hos sibi querere obtentus: sed non ideo statim jus esse desinit, siquid a malis usurpatur. Navigant et piratae: <sup>6</sup>ferro utuntur et latrones.

IX. 1 Sicut autem societas bellicas eo initas animo, <sup>7</sup>ut in quodvis bellum nullo causæ discrimine promittantur auxilia, illicitas diximus, ita nullum <sup>Silv. in Verbo</sup> <sub>Bellum, p. 1.</sub> <sup>8</sup>vitæ genus est improbus <sub>§ 10. circa f.</sub> quam eorum qui sine causæ respectu mercede conducti militant, et quibus

Ibi fas, ubi plurima merces.

Quod Plato <sup>7</sup>ex Tyrtæo probat. Hoc ipsum est quod *Aitolis* a Philippo exprobratum legimus: et *Arcadibus* a <sup>8</sup>Dionysio <sub>Liv. xxxii. 34.</sub>

Similiter hac de re vide.

<sup>7</sup> Locus, quem in animo habuit Auctor, exstat *de Legib.* Lib. i. pag. 630 b. Tom. ii. Ed. H. Steph. ubi equidem Philosophus adludit ad versus duos Tyrtaei, sed in quibus Poeta nullo modo lo-

quitur de iis qui mercede conducti militant. Plato tantum de illis loquitur, sed ita ut ejusmodi vitæ genus, in se spectatum, nec vituperet, nec laudet.

J. B.

<sup>8</sup> Locum forte reperi apud PHILO-

oven without a special commission. Now the impediment which forbids the subject to resist, does not arise from the cause, which is the same in the subject and the non-subject; but from the quality of the person, which does not pass over to others.

4 Thus Seneca thinks that I may attack in war him who, though he is a stranger to my nation, persecutes his own; as we said when we spoke of exacting punishment: and this is often joined with the defense of innocent subjects. We know indeed, both from ancient and from modern histories, that the desire to appropriate another's possessions often uses such a pretext as this: but that which is used by bad men does not necessarily therefore cease to be right. Pirates use navigation, but navigation is not therefore unlawful. Robbers use weapons, but weapons are not therefore unlawful\*.

IX. 1 But, as we have said, that leagues made with a view to mutual help in all wars alike, without distinction of the cause, are unlawful; so no kind of life is more disreputable than that of those who act as soldiers for pay merely, without regard to the cause; whose

\* See Barbevrae's happy verification of these and the following quotations.

Milesio his verbis: ἀγορὰ τολέμου πρόκειται, καὶ τὰ τῶν Ἑλλήνων κακὰ τὴν Ἀρκάδαν τρέφει, καὶ περιέρχεται πόλεμος αἰτίαν οὐκ ἔχει bellī instituuntur nundinae, et Graecorum mala in fructu sunt Arcadibus, et sine causarum respectu modo huc modo illuc arma circumferuntur. Res sane miseranda, ut Antiphanes loquitur:

[Apud Stob. tit. 33.]

\*Ος ἑνεκα τοῦ Γρη ἥρχετ' ἀποδανούμενος,

Miles \*qui vita causa se auctorat neci.

Orat. xvii.  
p. 249 D.

Dion Prusseensis: καὶ τοι τί τοῦ ζῆν ἀναγκαιότερον ἔστιν, ἢ τί τούτου περὶ πλείστου ποιοῦνται πάντες; ἀλλ' ὅμως καὶ τοῦτο ἀπολύνοντι διὰ χρημάτων ἐπιθυμίαν quid magis est necessarium nobis, aut quid pluris fit quam vita? et tamen hanc quoque non pauci perdunt, dum pecuniam querunt.

Bellum de Re  
milit. ii. P.  
tit. 2. n. 1.

2 Parum vero quod suam vendunt necem, nisi et aliorum ssepe innocentium venderent, tanto carnifice detestabiliores, quanto pejus est sine causa, quam ex causa occidere: sicut Antisthenes dicebat carnifices tyrannis esse sanctiores, quod illi nocentes, hi innocentes interficerent. Major Philippus Macedo huic hominum generi, τὰς τροφὰς εἰωθόσιν ἔχειν εἰ-

Apud Stob.  
Serm. 49.  
p. 350.

Diod. Sic.  
xviii. 10.

STRATUM, Vit. Sophist. Lib. i. cap. 22. sed qui non satis adcurate refertur et vertitur. Diximus plura in Notis Gallicis. J. B.

\* Qui vita causa se auctorat neci] Vita parari ea in quibus vita consumitur, dixit Seneca Naturalium v. 18. Plautus

Bacchidibus, [ibi nil tale, nec alibi, quod sciām, apud Plant. J. B.]

Suam qui auro vitam venditant.

Guntherus (Ligurin. L. VII. 510, &c.)

Ære dato conducta cohors, et bellica miles  
Dona sequens, predoque suum mutare fa-  
vorem

motto is, *the right is where the best pay is*: as Plato proves from Tyrtaeus. This is the reproach which Philip cast upon the Etolians, and Dionysius of Miletus upon the Arcadians; saying, that *there was a market where the Arcadians made a profit of the misfortunes of the Greeks*. As Antiphanes says, It is a wretched life to be ready to die in order to live. So Dio Prusseensis.

2 But that they sell their own lives is little, if it were not that they sell too the lives of other innocent men: and in this way they are worse than the hangman, in proportion as it is worse to kill men without a cause than for a cause: as Antisthenes says that executioners are more respectable than tyrants, for they kill guilty, these, innocent men. Philip of Macedon (the greater) said that for those whose gain was in a soldier's life, peace was war, and war, peace.

3 War is not one of the acts of life. On the contrary, it is a thing so horrible, that nothing but the highest necessity or the deepest charity can make it be right: as may be understood from what we

*τοῦ μισθοφορεῖν, quibus unus ex militia quaestus esset, dicebat bellum esse pacem, pacem bellum.*

3 Non est inter artifia bellum, imo res est tam horrenda, ut eam nisi summa necessitas, aut vera caritas honestam efficeret nequeat: quemadmodum ex iis intelligi potest quæ caput antecedentium proximo dicta a nobis sunt. Augustino judice: *militare non est delictum, sed propter prædam militare peccatum est.*

X. Imo et propter stipendium, si id unice aut præcipue spectetur: cum alioqui stipendium accipere licitum sit omnino: τίς στρατεύεται ἴδιος ὥψιλοις ποτέ; ait Paulus apostolus: *quis suis impensis militat?*

Sustus, et accepto pariter cum munere bello  
Hunc habuisse, dator pretul quem jussorit,  
hostem.

P Quanto peius est sine causa, quam  
ex causa occidere] Seneca Naturalium

v. 18. *Hoc vero quid aliud quis dixerit,  
quam insaniam? circumferre pericula, et  
ruere in ignotos, iratum sine injuria, oc-  
currentia devastantem, ac ferarum more  
occidere quem non oderis?*

De verbis  
Domini, se-  
cundum  
Matthæum.  
clatur causa  
xxiii. queat.  
l. c. 8. Vide  
supr. l. 2. 10.  
n. 5.  
1 Cor. l. 7.

have said in the last chapter but one. Augustine says, *to be a soldier is not a sin, but to be a soldier for plunder, is.*

X. And not for plunder only, but for pay, if that be regarded solely or principally; though in the other case, it is allowable to receive pay. St Paul says, *Who goeth to warfare at his own charge?*

## CAPUT XXVI.

### DE CAUSIS JUSTIS UT BELLUM GERATUR AB IIS QUI SUB ALIENO IMPERIO SUNT.

- I. Qui dicantur esse sub alieno imperio.  
II. Quid his faciendum si ad deliberationem adhibeantur, aut liberam electionem habent.  
III. Si imperetur ipsis, et causam belli injustam credant, non militandum.  
IV. Quid si dubient?  
V. Pietatis esse hac in re dubitantibus subditis parcere, sub onere tributi extraordinarii.  
VI. Quando subditorum arma justa sint in bello injusto.
- I. **E**GIMUS de his qui sunt sui juris: sunt alii in conditione parendi positi, ut filii familiarium, servi, subditi, etiam cives singuli, si cum civitatis sua corpore comparentur.  
II. Hi vero si aut ad deliberationem adhibentur, aut libera ipsis optio datur militandi aut quiescendi, easdem regulas sequi debent, quas illi, qui suopte arbitrio pro se aut aliis bella suscipiunt.  
III. 1 At si edicitur ipsis ut militent, quod fieri solet,

*Regid. Reg.  
de act. sup.  
disp. 31. n.  
80.*

<sup>a</sup> *Sed et Socrates]* Plato id nos docet in ipsius *Apologia*: (Pag. 29 c. Ed. H. Steph.) [Addo Lib. i. c. 4, §1, n. 3. M. T.] Et Apollonius, qui Neronis Edicto illud Sophocleum opponebat:

Οὐ γὰρ τί μοι Ζεὺς ἡνὸς ἐπρύξες τόδε.  
Nam iusta non hec Jupiter dederat mihi.

[Apud Philostratum, Lib. iv. c. 38. Ed. Olear.]

<sup>b</sup> *Hebraeorum exposita sententia]* Quam et Josephus eis tribuit *Antiquae Historiae* XVII. (cap. vii. § 3. division. Hud-sion.) θαυμαστὸν δὲ οὐδὲν εἰ τῶν σῶν δογμάτων δέξιωτέρους τετηρήσθαι ἡγούμενα νόμους οὐς Μωϋσῆς ὑπαγορεύει καὶ διδαχὴ τοῦ Θεοῦ γραψάμενος

κατέλιπε. nihil vero mirum, si servatu digniora credimus jussis tuis ea que Moses Deo suggeste ac docente scripta reliquit. Addo Rabbinum Tanchumam, citante Drusio ad locum Actorum.

<sup>c</sup> *In Domino]* Chrysostomus hoc in *Domino* sic explicat: τουτέστιν ἐν οἷς μὴ προσκρούστης Θεῷ: id est in quibus Deum offensurus non es. Idem ad partem infidelem: (Tom. vi. pag. 181. Ed. Savil.) οὐ γὰρ δὴ μικρὸς ἡμῖν κεῖται μισθὸς τοῖς τούς γεγενηκότας τιμῶσιν, ἀλλ' αἱ δεσπότας αὐτοῦ ιγείσθαι κελευσόμεθα, λόγῳ τε καὶ ἔργῳ θεραπεύειν, ὅταν μιῇ δὴ τὰ τῆς εὐσεβείας παραβλαπτητας' non enim

### CHAPTER XXVI. Of the just causes for which War may be made by those who are under the authority of another.

I. We have treated of those who are their own masters. There are others who by their condition are under authority, as sons of families, servants, subjects, even individual citizens, as compared with the whole body of their city.

si quidem constat ipsis injustam esse belli causam, abstinere <sup>Vict. de Jure Belli, n. 21.</sup> omnino debent. Deo potius obediendum quam hominibus, non Apostoli tantum dixerunt, <sup>Act. v. 29.</sup> sed et Socrates: et apud magistros <sup>Act. v. 29.</sup>

<sup>b</sup> Hebræorum exstat sententia, indicans regi contra Dei legem quid præcipienti prorsus non parendum. Polycarpi jamjam morituri dictum exstat: δεδιδάγμεθα γὰρ ἀρχαῖς καὶ ἔχοντιαις <sup>Apud Euseb. H. Eccl. iv. 13.</sup> ἀπὸ Θεοῦ τεταγμέναις τιμὴν κατὰ τὸ προσῆκον τὴν μὴ βλάπτουσαν ήμᾶς ἀπονέμειν· didicimus imperiis ac potestatibus a Deo ordinatis exhibere honorem quem par est, quique salutem nostram non impedit. Et Paulus Apostolus: filii, inquit, obedite parentibus <sup>Eph. vi. 1.</sup> in Domino, id enim aequum est. Ad quem locum Hieronymus: peccatum filiorum est non <sup>Tom. ix. p. 237 c.</sup> obedire parentibus; et quia poterant parentes aliquid imperare perversum, adjunxit, in Domino. Et <sup>d</sup> de servis addit: cum Dominus carnis a Domino spiritus diversum imperat, non est obediendum. Idem alibi: in illis tantum debent dominis et parentibus esse subjecti, quæ contra Dei mandatum non sunt. Nam et idem ille Apostolus dixerat, sui quemque <sup>Eph. vi. 8.</sup> operis mercedem reportaturum, sive liberum, sive servum. Tertullianus vero: satis præscriptum habemus, in omni ob- <sup>De Idol. c. 15.</sup>

exigua nobis merces proposita est, si honorem exhibeamus parentibus, sed ut dominos eos habere jubemur, verbisque et rebus obsequium ipsis præstare, extra quam si pietas lœdenda est. Sic accipe illud Hieronymi, per calcatum perge patrem, (Epist. i. ad Heliodorum, Tom. i. Pag. 1. Ed. Basil.) declamatorum dictum, sumtumque a latrone declamatore apud Senecam, (Controvers. VIII. p. 142. Edit. Gronov. major.) et quæ apud Ambrosium de Virginitate, et apud Augustinum Epist. XXXVIII. ad Lætum, et canone IV., Arabice interpretationis concilii Niceni I.

<sup>d</sup> De servis] Chrysostomus, i. Cor.

vii. 24: καὶ γάρ εἰσιν ὅροι δούλῳ παρὰ τοῦ Θεοῦ κείμενοι· καὶ μέχρι ποῦ δεῖ φυλάττειν αὐτοὺς καὶ τοῦτο νενομοθέτηται, καὶ ὑπερβάνειν αὐτοὺς οὐ χρή· διαν γάρ μηδὲν δεσπότη έπιτάχη τῶν μὴ δοκούντων τῷ θεῷ, ἐπεσθαι δεῖ καὶ πείθεσθαι, περιτέρω δὲ μηδέν. Sunt et servis limites sui a Deo præscripti, et quousque eos servare oportet et hoc præceptum est, neque eos licet excedere. Ubi enim nihil dominus jubet eorum quæ Deo improbantur, sequi et obsequi oportet, non ultra. (Tom. III. pag. 362.) De matrefamilias Clemens Alexandrinus: πάντα τῷ δυδρὶ πειθούμενη, εἰς μηδὲν ἀκούοντος ἑκείνου πρᾶξαν

II. These, if they are either called to counsel, or if a free option is given them of war or peace, ought to follow the same rulers as they who by their own decision undertake wars for themselves or others.

III. 1 But if they are commanded to join in a war, as often happens, if they are quite clear that the war is unlawful, they ought to abstain. That God is to be obeyed rather than men, not only the Apostles have said, but Socrates also: and the masters among the

*sequio esse nos oportere, secundum Apostoli praeceptum, "subditos magistratibus, principibus, et potestatibus: sed intra limites disciplinae. In martyrologio Silvanus martyr: siccirco Romanas leges contemnimus ut iussa divina servemus. Apud Euripidem dicenti Creonti:*

Phoen. v.  
1642.

Nonne exequi mandata fas ipsum jubet?

Respondet Antigone:

Non imperata jure nec jus exequi.

Stob. dit. 77.  
Hber. parent.  
honorand.

Musonius ita ait: *si quis aut patri, aut magistratui, aut domino turpia aut iniqua factu imperanti non paret, is nec inobediens est, nec injuriam facit, nec peccat.*

Lib. ii. 7.

2 Gellius negat probam esse sententiam, omnia esse quæ pater jusserrit parendum. Quid enim, ait, *si proditionem patricæ, si matris necem, si alia quædam imperarit turpia aut impia? Media igitur sententia optima atque tutissima visa est, quædam esse parendum, quædam non obsequendum.*

Decr. 271.

<sup>5</sup> Seneca pater: *non omnibus imperiis parendum est. Quintilianus: non omnia necesse est facere liberis, quæcumque patres imperant. Multa sunt quæ fieri non possunt. Si imperes filio ut sententiam dicat contra quam existimet: si testimonium jubeas dici ejus rei quam ignoret: si sententiam*

*ποτε, πλὴν δοτα εἰς ἀρετὴν τε καὶ σωτηρίαν διαφέρειν νομίζεται: in omnibus viro parebit, neque eo invito faciet quicquam, extra quæ credet ad virtutem salutemque momentum habere. (Stromat. Lib. iv. cap. 19. pag. 620. Ed. Oxon.)*

\* *Subditos magistratibus]* Exempla illustria et penas et laudis vide i. Sam. xxii. 18, 19. i. Reg. xviii. 4, 13. ii. Reg. i. 10, 12, 14. Apud Christianos Manuel et Georgius detrectarunt ministerium occidentæ Augustæ. Nicetas Alexio Manuelis filio. (Cap. 16.) [V. § 4, n.

9, adn. 5.]

<sup>1</sup> *Aut magistratū]* In paganis hominibus duo sunt nobilia exempla eorum qui principibus ad inhonestā obsecuti non sunt, Papiniani satis celebratum, et alterum Helpidii apud Ammianum xxi. (cap. 6.) Severus ne eos quidem penes expertes voluit esse qui Imperatori obsecuti essent ad necem senatoria. Vide Xiphilinum, (pag. 310<sup>a</sup>. Ed. H. Steph.)

<sup>6</sup> *Seneca pater]* Libro i. controversia i.

<sup>8</sup> *Quintilianus]* Idem alibi: non

Hebrews have a saying indicating that even the king, if he command anything against the law of God, is not to be obeyed. That our obedience is to be limited by our duty to God, is declared by Polycarp at the point of death; Jerome on St Paul, Eph. vi. 1; Tertullian; Sylvanus the martyr; Antigone in Euripides; Musonius.

2 That a father or master is not to be obeyed if he command a crime, as treason, the murder of his mother, false sentence, and the like, is asserted by Gellius, Quintilian, Seneca, Sopater. Stratocles was laughed at in Athens for proposing a law that whatever was

*in senatu : si capitolium me incendere jubeas, arcem occupare, licet dicere : Hæc sunt quæ fieri non oportet.* Seneca : <sup>De Benet. III.</sup> <sub>20.</sub> *non aut nos omnia jubere possumus, aut in omnia servi parere coguntur. Contra rempublicam imperata non facient : nulli sceleri manus commodabunt.* Sopater : ἔδει, φησί, πεισθῆναι τῷ πατρὶ. εἰ μὲν κατὰ νόμους, καλῶς. εἰ δὲ παρὰ τὸ πρέπον, οὐκ εὐλογούν patri, inquit, parendum est. Si quidem intra jura, recte : sin ultra honestum, non convenit.

<sup>1</sup> Irritus olim Stratocles, qui legem Athenis rogaverat, ut quicquid Demetrio regi placuisset id in Deos pium et inter homines justum esset. Plinius alicubi elaboratum a se ait, ut constaret <sup>Plut. in Demetr. pp. 889, 900.</sup> <sub>Lib. III. Epist. 9.</sub> <sup>L. Adeo, 157.  
D. de R. J.</sup> ministerium crimen esse.

3 Ipsa jura civilia, quæ peccatis excusabilibus facile veniam præbent, favent quidem his qui parere necesse habent, sed non in omnibus. Excipiunt enim ea quæ atrocitatem habent facinoris vel sceleris, quæ sua sponte scelerata ac nefaria sunt, ut loquitur Tullius, maleficia quæ sponte et non disputatione jurisconsultorum sed naturali interpretatione fугienda sunt, ut Asconius interpretatur. <sup>In hunc loc.</sup>

4 Narratum Hecatæo Josephus memorat, Judæos qui <sup>Lib. I. contr. Apion. c. 22.</sup> <sub>P. 456.</sub> Alexandro Macedoni militabant, neque verberibus neque con-

*omnia præstanda etiam parentibus. A-*  
*lioquin nihil est perniciösus acceptis*  
*beneficiis : si in omnem nos obligant ser-*  
*vitatem.* (*Declamat.* 333.)

<sup>1</sup> Irritus olim Stratocles] Talis erat syngrapha illa quam a Basilio Camatero Andronicus Commenus exegerat : ἐκεῖνα ἐν τῷ δρχιερατεῖνι διατάχτεσθαι δος φιλητὰ Ἀνδρονίκων, καν εἶναι ταναθέματα, κάκεινα πάλιν ἀποστρέψειν, ὅποσα οὐχ ἱδύνει Ἀνδρονίκον illa in pontificio se facturum quæ grata Andronico essent, quamvis plane nefaria:

*contra defugiturum se ea quæ Andronico non placent.* [Nicetas, Alex. cap. 15.]

<sup>2</sup> Ministerium crimen esse] Tertullianus de Anima : plus cæditur qui iubet, quando nec qui obsequitur excusat. (Cap. 40.) et de Resurrectione Carnis : cum humana censura eo perfectior habeatur, quo etiam ministros facti cuiusque depositit, nec parcens aut invidens illis, quo minus cum auctoribus aut pœnae aut gratie communicent fructum. (Cap. 15.) Vide Gaium de Pace Publica, Lib. I. cap. iv. n. 14.

thought good by Demetrius, should be reckoned right and pious. Pliny somewhere says that he had laboured to prove that to be ministerial in a crime was a crime.

3 Even the Civil Law, which is facile in giving pardon to excusable offenses, is favourable to those who are under the necessity of obeying, but not to all. It excepts cases of great atrocity, crimes which are naturally abominable, not condemned by the opinion of lawyers only, but by natural feeling.

4 Josephus relates that the Jews, under Alexander the Great, would

tumelius ullis adigi potuisse, ut ad Beli templum, quod Babylone erat, instaurandum, humum cum militibus ceteris aggernerent. Sed proprius nostri argumenti exemplum habemus in Thebæa legione, de qua supra egimus, et in Juliani militibus, de quibus sic Ambrosius: *Julianus Imperator quamvis esset apostata, habuit tamen sub se Christianos milites: quibus cum dicebat, producete aciem pro defensione reipublicæ, obediebant ei: 'cum autem diceret eis, producete arma in Christianos, tunc agnoscebant Imperatorem cœli.* Sic et spiculatores legimus ad Christum conversos mori potius ele-  
gisse, quam edictis et judiciis in Christianos manum com-  
modarent.

*Vict. de Jure  
Bell. n. 23.*

5 Tantundem erit si quis falso <sup>1</sup>persuasus sit quod impe-  
ratur injustum esse. Nam huic tantisper ea res pro illicita

<sup>1</sup> *Cum autem diceret eis, producete arma in Christianos]* Non enim ab omni-  
vi in Christianos abstinuit Julianus, tunc maxime ubi colorem aliquem na-  
tus sibi videbatur. *Julianus Christiani jugulator exercitus,* in Hieronymi scripto  
ad Nepotianum: [*Epitaph. Nepotian.* Tom. i. pag. 26 c. *Ed. Basil.*] cooptam  
ejus imperio Antiochiam persecutionem, et juvenem quandam tortum, narrat  
Augustinus de *Civitate Dei*, Lib. xviii.  
cap. 52. in martyrologiis memoria cele-  
bratur S. Eliphii Scotti et sociorum ejus  
33. quos Julianus inter Tullensem et  
Grandensem civitatem decollari fecit.  
Vide et Joannem Antiochenum in  
excerptis ex manuscripto Peiresiano.

(Pag. 842.) Augustinus *Epistola l.*  
ad Bonifacium citatus a Gratiano causa  
xi. quest. iii: *Julianus exstitit infidelis  
Imperator: nonne exstitit apostata ini-  
quus et idololatrus? milites Christiani ser-  
vierunt Imperatori infideli, ubi veniebant  
ad causam Christi non agnoscebant nisi  
illum qui in celo erat: quando volebat  
ut idola colerent et thurificarent, prepo-  
nebant illi Deum.* [Laudatus locus jam  
supra Lib. i. cap. xi. § 10. num. 11. ubi  
vid. not.]

<sup>1</sup> Vocem illam *falso* addidi, quam  
sententia manifesto postulat, eti in om-  
nibus Editionibus desit. *J. B.*

<sup>m</sup> *Impunitatem concedunt obedienti-  
bus]* Chrysostomus de *Providentia* iii.

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perform other military works, but could not be compelled to pile up earth to restore the temple of Belus. But we have a closer exception in the Theban legion under Julian, who were willing, as Ambrose says, to use their arms for the State, but not against Christians; when required to do this, they obeyed the King of heaven, not the emperor of earth. So we read that, of the soldiers whose office it was to execute the condemned, those who had been converted died rather than lay their hands on the Christians.

The rule is the same, if any one be falsely persuaded that what is commanded is unjust. The thing is unlawful for him, as long as he retains that opinion, as appears by what is said above.

IV. 1 But if the subject doubts whether the matter be lawful or not, must he remain quiet or obey [and assist in war?] Most writers

est, quamdiu eam opinionem non potest deponere: ut ex supra tractatis apparent.

IV. 1 Quod si dubitet, res licita sit necne, eritne quiescendum an parendum? Parendum plerique censent: nec obstatre illud laudatum, Quod dubites ne feceris: quia qui contemplative dubitat potest activo judicio non dubitare: credere enim potest in re dubia obsequendum superiori. Et sane quin haec distinctio judicii duplicitis in multis actionibus locum habeat, negari non potest. Jura civilia, non Romanorum tantum, sed et aliarum gentium, in tali circumstantia non modo <sup>m</sup>impunitatem concedunt obedientibus, sed et actionem in eos civilem denegant. Is damnum dat, aiunt, qui jubet dare: ejus vero nulla culpa est, cui parere necesse est. Necessitas potestatis excusat, et similia.

2 Ipse Aristoteles *Nicomachiorum* quinto, his qui injus-

πολλοὶ γοῦν ἀρχόντων ἐπὶ φόνοις δῖσ-  
κοις κατηγορθέντες, ξίκην ἔδοσαν·  
τὸν δὲ δημίου τὸν διακονομένους τῷ  
φόνῳ καὶ αὐτόχειρας γενομένους τῆς  
σφαγῆς, οὐδὲ εἰς δικαστήριον ἐλκύσαι  
τις, ἀλλ' οὐδὲ ζητήσαι τὴν δρχὴν, τῆς  
διάγκης ὑπὲρ αὐτῶν ἀπολογουμένης,  
καὶ τοῦ τῆς ἀρχῆς ἀξιώματος καὶ τοῦ  
τῆς ὑποταγῆς φίβον<sup>v</sup> multi saepe ma-  
gistratum ob injistas cedes accusati  
pœnas dederunt. At carnifices qui cædi  
ministerium, qui manuum operam pre-  
buere, nemo in jus vocaverit, imo de iis  
ne quaesiuerit quidem: excusat enim eos  
necessitas ex dignitate jubentis et ex pa-  
rentis timore. (Tom. vi. pag. 870. Ed.  
Savil.) Ex Celso Ulpianus, servum, ait,

L. It. dam-  
num, 160.  
De Reg. Jur.  
I. liber homo  
37. D. ad L.  
Aquil. I. non  
ridetur, 167.  
§ gutt juss. 1.  
de R. Jur.  
Paul. I. v.  
ten. tit. 92.  
§ 2. Leges  
Longobard.  
lib. i. tit. 26.  
de termi-  
nato. Leges  
Wistipoth. II.  
tit. II. c. 2.  
Lib. VIII. tit.  
I. c. 1, 3, 4.  
Lib. VII. tit.  
4. c. 1.  
Cap. 12.

nihil delinquisse, qui domino jubenti ob-  
temperavit. Lib. 2. D. de Nox. Act.  
Velle non creditur qui obsequitur imperio  
patria vel domini. L. 4. D. de Regulis  
juris, et ibi Cujacius. Seneca: In vo-  
lente necessitas non est. (Epist. 61.)  
Adde legem Longobardicam Lib. I. tit.  
iv. cap. 11. Mithridates libertos Attili,  
conscios cædis in se cogitat, impunitos  
dimisit, et ejus qui a se defecerat filios.  
[Immo filii amicos. Pag. 241. Ed. H.  
Steph. et pag. 233.] Appianus Mithri-  
datico. Absolutus Tiberius Græchus a  
culpa Numantini fuderis, quoniam alieno  
imperio peccaverat. (Plutarch.  
pag. 826, 827.)

think that he ought to obey. And they hold that the rule does not apply, *If you doubt do not do it*. Because he who doubts speculatively, may not be in doubt in his practical judgment. He may believe that in a doubtful matter he ought to obey his superior. And certainly, that this distinction of a twofold judgment, a speculative and a practical, holds in many actions, cannot be denied. Civil Laws, not those of the Romans only, but of other nations also, in such circumstances, not only grant impunity to those who obey, but also refuse a civil action against them. They say, he does the damage who orders it to be done; he is in no fault who is obliged to obey; the necessity imposed by authority excuses; and the like.

2 So Aristotle enumerates, among those who do an unjust thing,

tum quidem aliquid faciunt, non autem injuste, annumerat famulum domini imperantis: *injuste autem eum ait agere, a quo actionis principium est; nimirum quia in famulo vis deliberatrix plena non est, ut indicat proverbium:*

*Ημουν τῆς ἀρετῆς ἀποαιρει δούλιον ήμαρ.*

Dimidia virtute caret servire coactus.

Et simile<sup>2</sup>:

*Ημουν γάρ τε νόου ἀπαμείρεται εὐρύοπα Ζεύς  
Ἀνδρῶν οὐς ἀν δὴ κατὰ δούλιον ήμαρ ἔλησι.  
Tollitur huic hominum generi pars altera mentis  
Ab Iove, servilem voluit quos ducere vitam.*

Et illud quo Philo utitur:

*Δοῦλος πέφυκα. οὐ μέτεστι σοι λόγου.*

Servi tua est fortuna: <sup>3</sup>ratio ad te nihil.

Ann. vi. 8.

Et illud Taciti: *principi sumnum rerum judicium Dii dederunt, subditis obsequii gloria relicta est.* Narrat idem scriptor Pisonis filium a Tiberio crimen belli civilis purgatum: *patris quippe jussa, nec potuisse filium detrectare.* <sup>4</sup>Seneca: *servus herilis imperii non censor est, sed minister.*

Lib. xxii. 75.  
cont. Faust.

3 Et specialiter in hac de militia quæstione ita sensit

<sup>2</sup> Versus Homerici, quos tamen Auctor non ex ipso fonte, sed quales leguntur apud PLATONEM, *de Legib.* Lib. vi. pag. 777 a. Ed. H. Steph. heic refert. Nam ipse Poeta ita habet in Editionibus nostris:

*Ημουν γάρ τ' ἀρετῆς ἀποαιντει εὐρύοπα Ζεὺς  
Ἀνέρος, εὐτ' ἀν μιν κατὰ δούλιον ήμαρ ἔλησι.  
Odyss. Lib. xvii. vers. 322, 323. [Lectio-  
nem Platonis habent et Athenaeus et*

*Etymol. Magn.* Vid. Clark et Ernesti ad h. l. M. T.] Præcedentem autem versum haesit Auctor e LONGINO, *de Sublim.* § 43. nisi quod ibi legitur *dīro-*  
*alvvrai*. Rhetor etiam illum profert, tamquam ex Homero. J. B.

<sup>3</sup> Ratio ad te nihil] Themistius oratione IX. principes rationi esse dicit similes, milites ira. (Pag. 197. Edit. Petav. 1618. ubi illud, quasi ex Platone,

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but do not act unjustly, the servant of the master who commands it; he says that he who in such case acts unjustly, is he in whom the origin of the action is. For in the servant, the power of deliberation is not complete. As in the proverb, and in Homer, *The day that makes man a slave takes half his worth away.* And so Philo, *You are a slave, what have you to do with reason?* So Tacitus. And the same writer narrates that Tiberius forgave the crime of Piso's son, who engaged in the civil war: because his father commanded, and the son could not refuse. So Seneca says, *The slave is not the critic, but the minister of the command.*

3 And especially in this question of acting as a soldier, Augustine so thought. He says, *A just man acting as soldier, even under a sacrilegious king, may rightly take a part in war at his command, if he be*

**Augustinus.** Sic enim ait: *Ergo vir justus, si forte sub rege etiam sacrilego militet, recte potest illo jubente bellare, si civicas pacis ordinem servans, quod sibi jubetur, vel non esse contra Dei præceptum certus est, vel utrum sit, certus non est: ita ut fortasse reum faciat regem iniquitas imperandi, innocentem autem militem ostendat ordo serviendi.* Et alibi: *Miles cum obediens potestati sub qua legitime* <sup>De Cœ. Del.</sup> <sub>l. 26.</sub> *constitutus est hominem occidit, nulla civitatis sua lege reus est homicidii: imo nisi fecerit, reus est imperii deserti atque contenti: quod si sua sponte atque auctoritate fecisset, in crimen effusi humani sanguinis incidisset. Itaque unde punitur si fecerit injuscos, inde puniretur si non fecerit jussus.* Atque hinc passim recepta est sententia, subditos quod attinet, dari bellum utrimque justum, id est injusitia vacans, quo illud pertinet<sup>3</sup>:

Quis justius induat arma  
Scire nefas.

4 Non caret tamen hoc sua difficultate. Et Adrianus nostras, qui Cisalpinorum ultimus Pontifex Romanus factus est, <sup>4</sup>contrariam defendit sententiam, quæ stabiliri potest non profert.)

• *Seneca] De Controversiis III. 9.*  
• *Nulla civitatis sua lege reus est homicidii]* Idem Augustinus de *Libero Arbitrio* libro I. *Si homicidium est hominem occidere, potest aliquando accidere sine peccato, nam et miles hostem, et iudex vel minister ejus nocentem, et cui forte invito atque imprudenti telum de manu fugerit, non mihi videntur peccare*

*cum hominem occidunt: sed nec etiam homicide isti appellari solent.* Retulit Gratianus in cause XXIII. quæstionem V. (Ex cap. 4. dict. Lib.)  
<sup>5</sup> *Versus LUCANI, Pharsal. Lib. I. vers. 126, 127. J. B.*  
<sup>6</sup> *Contrariam defendit sententiam]* Exemplum hanc sequentium est apud Scaphnburgensem.

Silv. in Verb.  
Bell. I. n. 8.  
concl. 4.  
Cast. in l. v.  
D. de Just.  
Soto, L. v. q.  
I. art. 7. et q.  
3. art. 3.  
Vict. de Jure  
Bell. n. 32.  
Covar. in c.  
peccat. part.  
2. § 10.  
Adr. Quæst.  
quodl. 2.

certain that what is commanded is not against the precepts of God, or if he be not certain that it is so; the iniquity of the command may make the king guilty, but the rule of obedience may make the soldier innocent. And elsewhere, A soldier, when he kills a man, obeying legitimate power, is not guilty of homicide. If he had done so without command, he would be liable to punishment; if he do not so under command, he is also liable to punishment. And hence the opinion is everywhere received, that so far as subjects are concerned, there may be wars which are just on both sides, that is, free from injustice. So Lucan.

4 But this matter is not without difficulties of its own. Adrian our countryman, who was the last Cisalpine Pope, defends the contrary opinion. And it may be supported, not precisely on that ground which he adduces, but on this which is more satisfactory, that he who

illa præcise ratione quam ille adfert, sed hac quæ magis urget, quod qui dubitat contemplative, debeat judicio activo eligere partem tuiorem. Est autem<sup>4</sup> pars tutior abstinere bello.

*Joseph. Bell.*  
*Jud. ii. 8. § 7.*

*De Vit.*  
*Pythag. § 106.*

illa præcise ratione quam ille adfert, sed hac quæ magis urget, quod qui dubitat contemplative, debeat judicio activo eligere partem tuiorem. Est autem<sup>4</sup> pars tutior abstinere bello. Laudantur Esseni quod inter alia jurarent μὴ βλάψειν τινὰ μήτε ἐξ ἐπιτάγματος· non nocituros se cuiquam, ne si juberentur quidem: imitatores horum Pythagorei, qui, Jamblichus teste, bello abstinebant, causa addita, quia φόνων χορηγέτης καὶ νομοθέτης ὁ πόλεμος, bellum cœdes subministrat atque imperat.

*Bald. ii. cons.*  
*383. Sotus de*  
*det. secr.*  
*membr. 3. q.*  
*2. in resp.*  
*ad 1.*

5 Neque obstat quod ex altera parte periculum est inobedientiae. Nam cum utrumque incertum sit (nam si injustum est bellum, jam in ejus vitiatione nihil est inobedientiae) caret peccato, quod ex duabus minus est. Inobedientia autem in ejusmodi rebus suapte natura minus malum est quam homicidium, præsertim multorum innocentium. Narrant veteres cum Mercurius ob Argum imperfectum accusatus Jovis mandato se defendisset, <sup>5</sup>non tamen ausos Deos eum absolvere. Sed nec Pothinum Ptolemæi satellitem Martialis, cum ait:

*Llib. III.*  
*Epiq. 68.*

Antoni tamen est pejor quam caussa Pothini:  
Hic facinus domino præstitit, ille sibi.

*Vict. de Jure*  
*Belli, n. 25.*

Nec magni ponderis est quod contra nonnulli adferunt, fore

<sup>4</sup> Bene quidem, ubi libertas relinquitur subditis militandi, vel non militandi. At vero ubi necessitas imponitur jussu Principis, tunc pars tutior est,

ei parere, cui parendum esse nulla dubitandi ratio est, quippe legitimo Imperanti. Plura diximus in Notis nostris Gallicis. *J. B.*

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doubts speculatively ought in practice to choose the safer side. And the safer side is, to abstain from war\*. The Essenes are praised for swearing that they would not harm any one, even if they were commanded. And so are their imitators the Pythagoreans, who abstained from war, as Jamblichus says, adding for cause that war produces bloodshed.

5 Nor is it a sufficient objection to this, that on the other side there is the danger of disobedience. For when the right and wrong is uncertain (for if the war be unjust, there is no [moral] disobedience in declining it,) then disobedience is free from sin, and this is the less of two evils. Disobedience in such a case is a less evil than homicide, and especially, than the homicide of many innocent persons. So the ancients say that the gods would not absolve Mercury for the death of Argus, though done by the command of Jupiter†. And so Martial condemns Pothinus the attendant of Ptolemy, who put him to

\* Barbeyrac says the safer side may be to obey: but Grotius is speaking of the danger of being morally wrong, not of danger to outward fortunes. W.

† Barbeyrac remarks, that the example is not pertinent.

ut id si admittatur pereat sœpe respublica; quia plerunque non expedit rationes consiliorum edi populo. Ut enim hoc verum sit de causis suasoriis belli, de justificis verum non est, quas oportet claras esse et evidentes, et proinde tales quæ palam exponi et possint et debeant.

6 Quod de legibus nimis forte indistincte dictum a Tertulliano est, in his legibus sive edictis de bello gerendo locum justissime habet: *neque civis fideliter legi obsequitur, ignorans quale sit quod ulciscitur lex: nulla lex sibi soli conscientiam justitiae suæ debet, sed eis a quibus obsequium exspectat.* Ceterum suspecta lex est, quæ probari se non vult: *improba autem, si non probata dominetur.* Apud Papinum Achilles Ulyxi se ad bellum excitanti ait (*Achilleid.* Lib. II. vers. 332):

Quæ Danaïs tanti primordia belli,  
Ede: libet justas hinc sumere protinus iras.

Apud eundem Theseus (*Theb.* XII. 648):

Ite alacres, tantæquo precor confidite causa.

Propertius dixerat (Lib. IV. *Eleg.* VI. vers. 51, 52):

Frangit et attollit vires in milito causa:  
Quæ nisi justa subest, excutit arma pudor.

<sup>5</sup> Nescio cuius fide hoc referat Auctor: sed cuivis statim patet, exemplum aptum non esse, ut etiam observavit O-

brechtus, quandoquidem Jovis mandatum injustum erat, et tale a Mercurio non poterat non adgnosci. *J. B.*

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death, as worse than Antony who commanded the act. Nor is that of much weight which is alleged on the other side; that if such a rul<sup>o</sup> were adopted, the state would often be damaged, since generally it is not expedient to publish to the people the grounds of public acts. For however true this may be of the impelling causes of war, it is not true of the justificatory causes, which should be clear, and such as both may and ought to be openly expounded.

6 What Tertullian says, somewhat indistinctly, of laws in general is very just with regard to laws or edicts for making war: *A citizen does not obey the laws faithfully if he be ignorant at what crime the punishment of the law is aimed. The law may not be content with its own conscience; it owes a justification to those for whom it claims obedience. A law is suspected, which does not seek moral approbation; it is bad, if, being examined, it is not approved.* So in the *Achilleis* of Statius, Achilles requires Ulysses to instruct him of the justice of the Greek cause. And in his *Thebaüs*, Theseus bids his followers to go forwards, confiding in their just cause. So Propertius had said that the soldier's courage rises and falls with his cause; and that if that be not just, his

*Nazar. Panegy.* Cui par illud Panegyristæ: *tantum etiam inter arma bona conscientia sibi vindicat, ut jam cœperit non virtutis magis quam integratatis esse victoria.* Ac sic viri quidam eruditæ interpretantur ♂<sup>ν</sup> quod legitur <sup>1</sup>Gen. xiv. 14, ut sensus sit, ministros Abrahæ ante prælium ab ipso plene institutos de armorum suorum justitia.

7 Et sane denuntiationes, ut mox infra dicemus, palam fieri solebant et expressa causa, ut totum quasi genus humænum de justitia causæ posset cognoscere. Scilicet prudentia virtus est, ut et <sup>6</sup>Aristoteli visum, imperantis propria: justitia vero hominis qua homo est.

8 Omnino autem sequenda videtur ea quam diximus *Mglid. Reg. de act. sup. dīsp. 31. dub. 5. n. 85. Barnes 2. 2. q. 40. art. 1. Mollm. tr. 2. dīsp. 113.* Adriani sententia, si subditus non modo dubitet, sed argumen- tis probabilibus inductus magis in id propendeat ut bellum injustum esse putet: præcipue vero si de aliis impetendis, non de suis tuendis agatur.

9 Quin probabile est, etiam carnifici qui damnatum occi-

<sup>1</sup> *Genesis xiv. 14]* Quidam in eundem sensum trahunt vocem γάρ et interpretantur *a se instituto*. Herodes in oratione ad Iudeos post cladem in Arabia, apud Josephum: βούλομαι δὲ πρώτου μὲν ἡπέρ τοῦ πολεμεῖν οὐδεὶς δικαίως αὐτὸς ποιοῦμεν, ἐπιδείξαι, δια τὴν ὑβριν τῶν ἐναντίων ἡμαγκασμένοι· μέγιστου γάρ, εἰ μάθοιτε τοῦτο, προ θυμίας ἀλτίον ὕπειν ἔσται: volo autem ostendere vobis quam juste suscepimus hoc bellum, coacti inimicorum confluence. Id enim si intellexeritis, magnum vobis ad audendum erit incitamentum. (*Antiq. Jud. Lib. xv. cap. v. § 8. division. Hudson.*)

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arms are blunted. And so that Panegyrist says, that conscience has so great a power in arms, that victory depends more upon integrity than upon courage. And so some learned men interpret what is said of Abraham's arming his servants, to imply that he instructed them of the justice of his cause, Gen. xiv. 14.

7 And in fact, declarations of war used to be made, as we shall have to say hereafter, accompanied by a declaration of the cause of the war; that the whole human race, as it were, might judge of its justice. And as Aristotle says, prudence is properly the virtue of a ruler, but justice is a virtue which belongs to man as man.

8 But undoubtedly the opinion of Adrian which we have mentioned seems fit to be followed, if the subject not only doubts of the justice of the cause, but, induced by probable arguments, rather inclines to believe the war unjust: especially if the question be of attacking others, not of defense.

9 It is also a probable opinion that an executioner who is to put a man to death, ought to know that there is a cause in his deserts for doing so; either as having been aware of the trial and proofs, or

surus est, hactenus, aut quod quæstioni et actis interfuerit, aut ex rei confessione cognita esse debere causæ merita, <sup>ut</sup> satis ei constet mortem ab eo commeritam: idque nonnullis in locis observatur: nec aliud spectat lex Hebræa, cum ad Deut. xvii. 7. lapidandum cum qui damnatus est testes vult præire populo.

V. 1 Quod si subditorum animis per causæ expositionem satis nequeat fieri, omnino officium erit boni magistratus tributa ipsis potius extraordinaria imperare, quam operam militarem: præsertim ubi non defuturi sunt alii qui militent: quorum voluntate non tantum bona, sed et mala uti potest rex justus, quomodo Deus et Diaboli et impiorum parata opera utitur; et sicut culpa caret qui egestate pressus pecuniæ sumit ab improbo sceneratore.

2 Imo etiam si de causa belli dubitari non possit, minime tamen videtur æquum ut Christiani inviti cogantur militare, <sup>7</sup> cum a militia abstinere, etiam cum militare liceat, majoris cuiusdam sit sanctitatis, quæ et a clericis et a pœnitentibus

<sup>6</sup> Ἡ δὲ φρόνησις ἀρχοντος Ἰδος ἀρετὴ μόνη. *Politic.* Lib. iii. cap. iii. [cap. ii. § 11. *Stahr.*] *J. B.*

<sup>7</sup> *Ut satis et constet mortem ab eo commeritam*] Ideo indicta causa sacerdotes Nobis habitantes occidere noluere Saulis ministri Doego probiores, 1. Sam. xxii. 17. Et Achabi spiculator tertius nocere Eliæ noluit, 11. Regum i. 13. et

sequentibus. Aliquot etiam carnifices ad Christum conversi in posterum eo manere ut periculo abstinuere. Vide *Martyrologium*, et Bedam, l. i. cap. 7.

<sup>7</sup> Heic et in precedentibus non satis adcurate Auctorem nostrum ratiocinari, ostendimus in Notis nostris Gallicis. *J. B.*

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by the confession of the criminal. And this is observed in some places; and to this the laws of the Hebrews seem to have regard, when, in the stoning of a condemned person, it directs the witnesses to begin the execution.

V. 1 But if the minds of the subjects cannot be satisfied by the exposition of the cause, it will by all means be the part of a good magistrate rather to impose extraordinary contributions upon them, than military service; especially as it is to be supposed that persons willing to serve as soldiers will not be wanting; whose acts, not only if they are morally good, but even if they are bad, a just king may use; even as God makes use of the spontaneous acts of the devil and of impious men; and as he is free from fault, who being in pecuniary distress, takes money from a wicked usurer.

2 And even if there can be no doubt as to the justice of the war, it does not seem at all equitable that Christians who are unwilling should be compelled to act as soldiers; when we consider that to abstain from military service, even when such service is lawful, is the course

diu exacta est, aliis vero omnibus multis modis commendata. Origenes Celso Christianis objectanti militare detrectationem sic respondet: *his qui a fide alieni pro republica militare nos jubent, et homines occidere, ita respondebimus: Hi qui simulacrum vestrorum sunt sacerdotes, et deorum quos putatis flamines, dextras puras servant sacrificiorum ergo, ut ea incuruentis et nulla cæde maculatis manibus offerant his qui creduntur dii: neque si quod exoriatur bellum sacerdotes asscribuntur numeris. Quod si id ratione non caret, quanto magis ceteris militantibus, illi quoque suo modo censendi sunt militare, tanquam Dei sacerdotes atque cultores, qui manus quidem servant puras, sed precibus apud Deum certant pro his qui juste militant, et pro eo qui juste regnat? quo in loco sacerdotes vocat quosvis Christianos, exemplo sanctorum scriptorum, Apoc. i. 6; 1 Pet. ii. 5.*

VI. 1 Arbitror vero evenire etiam posse, ut in bello non dubio tantum sed et manifeste injusto justa aliqua esse possit subditorum defensio. Nam cum subditos innocentes, et a belli culpa remotos, interficiendi jus verum et internum hostis, justum quamvis bellum gerens, non habeat, nisi aut ad necessariam defensionem, aut per consequentiam et extra propositum, (pœnæ enim illi obnoxii non sunt) sequitur ut si certo constet hostem eo venire animo, ut hostilium subdit-

directed by especial holiness, such as was long exacted of ecclesiastical persons and penitents, and strongly recommended to all others in many ways. Origen, answering the objection of Celsus to the Christians, that they declined military service, says: *Those who require this, we remind of the priests of the heathens, who were bound to keep themselves pure from the shedding of human blood; and this ought still to be the rule for those who are all priests of God. They in their prayers to God wrestle for them who fight justly, and for him who reigns justly: where he calls all Christians priests, following the Scriptures, Rev. i. 6; 1 Pet. ii. 5.*

VI. 1 I think however that it may happen, that in a war not doubtful, but even manifestly unjust, there may be a just defense of the subjects who take a part in it. For since the enemy, though carrying on a just war, has not a true and intrinsic right to kill innocent subjects, who have nothing to do with the fault of the wars, except either for necessary defense, or by consequence and extrinsically to his purpose; (for they are not liable to punishment;) it follows that if it be clear that the enemy comes with such a purpose

rum vite parcere cum possit, omnino nolit, subditi illi tueri se possint ex jure naturæ, quod gentium jure ademptum illis non est.

2 Neque tunc dicemus bellum utrinquo justum esse: non enim de bello, sed de certa ac definita actione quaeritur. Illa autem actio, quamvis de cetero jus ad bellum habentis, injusta est, et proinde juste repellitur.

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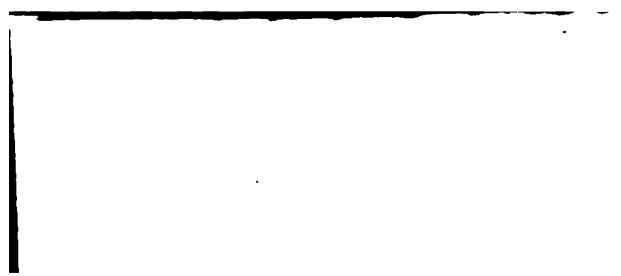
that though he could save the lives of the subjects of his adversary, he will not; those subjects may defend themselves by the law of nature, which they are not divested of by the law of nations.

2 Nor shall we then say that the war is just on both sides; for the question is not concerning the justice of the war, but concerning a certain and definite action of the enemy. And this action, though it be the action of a person having in other respects a right of making war, is unjust, and therefore may be justly repelled.

END OF VOLUME II.



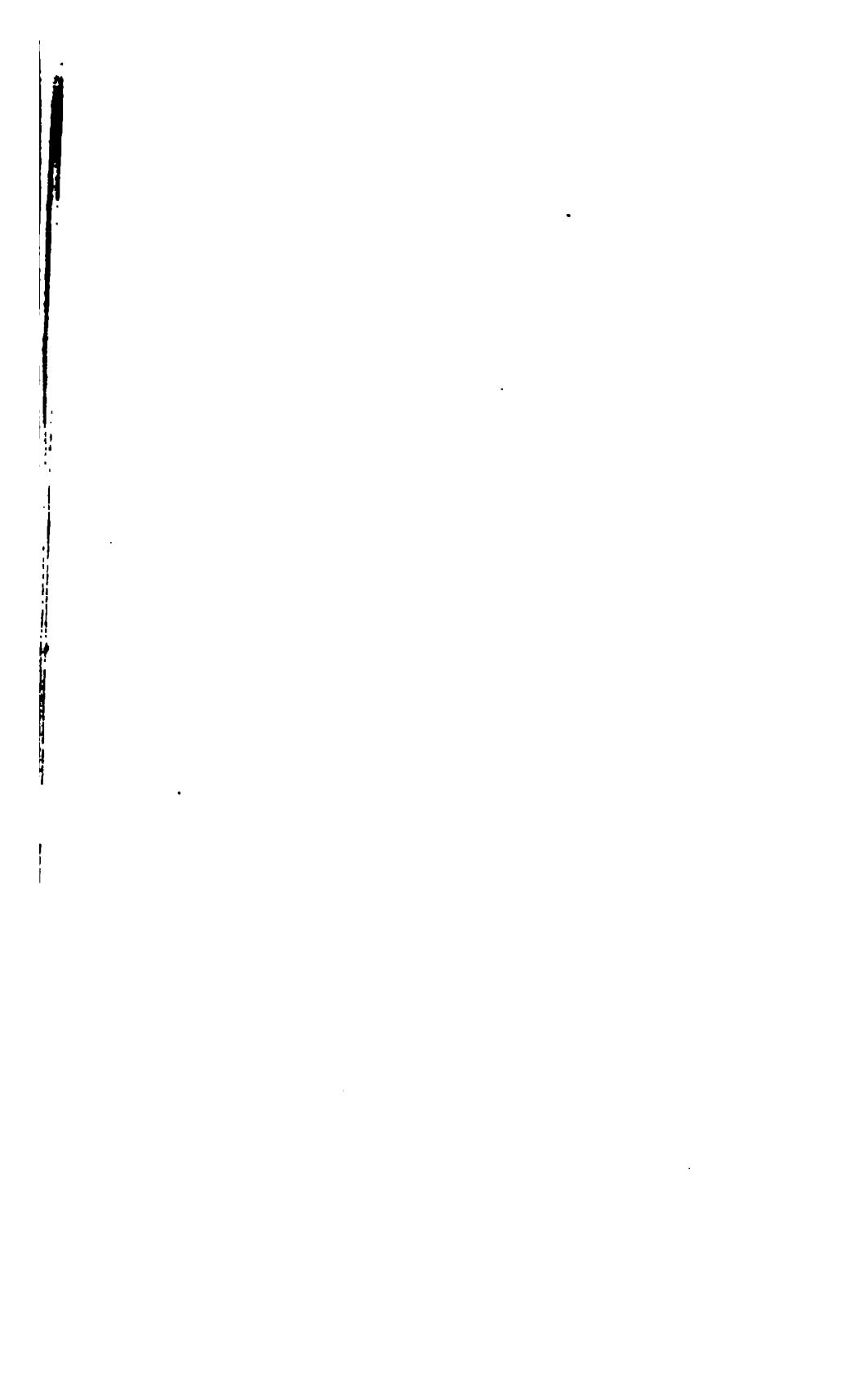




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